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915

No. 2459

United States

Circuit Court of Appeals

For the Ninth Circuit.

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, a Corporation,

Appellant,

vs.

PACIFIC CREOSOTING COMPANY, a Corporation,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 2459

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4354.

PACIFIC CREOSOTING COMPANY, a Corporation,

Libelant,

vs.

THAMES AND MERSEY MARINE INSURANCE COMPANY, LTD.,

Respondent.

Names and Addresses of Counsel.

EDMUND B. McCLANAHAN, Esq., 1101 Merchants Exchange Building, San Francisco, California;

S. HASKET DERBY, Esq., 1101 Merchants Exchange Building, San Francisco, California;

EDWARD BRADY, Esq., 1308 Alaska Building, Seattle, Washington;

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Proctors for Respondent and Appellant.

W. H. BOGLE, Esq., 610 Central Building, Seattle, Washington;

CARROLL B. GRAVES, Esq., 610 Central Building, Seattle, Washington;

E. T. MERRITT, Esq., 610 Central Building, Seattle, Washington;

LAWRENCE BOGLE, Esq., 610 Central Building, Seattle, Washington;

Proctors for Libelant and Appellee. [1*]

[Title of Court and Cause.]

Statement.

TIME OF COMMENCEMENT OF SUIT.

August 10, 1910.

NAMES OF PARTIES TO SUIT.

Libelant: Pacific Creosoting Company, a corporation.

Respondent: Thames and Mersey Marine Insurance Company, Ltd.

DATE OF FILING RESPECTIVE PLEADINGS.

Libel filed August 10, 1910.

Exceptions to Libel filed October 22, 1910.

Answer of respondent to Interrogatories filed January 31, 1911.

Exceptions to Answer and Interrogatories filed February 16, 1911.

Answer of libelant to Interrogatories filed May 16, 1911.

Amended Answer to Fifth Interrogatory filed May 26, 1911.

Defendant in above cause has not been arrested, bail has not been taken, nor property attached.

Time of trial March 5, 1913.

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*Page-number appearing at foot of page of original certified Record.

Judge: Honorable Jeremiah Neterer.

Final Decree by Honorable Jeremiah Neterer, filed February 26, 1914.

Notice of Appeal with Admission of Service filed February 27, 1914. [1½]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4354—IN ADMIRALTY.

PACIFIC CREOSOTING COMPANY (a Corporation),

Libellant,

vs.

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,

Respondent.

Libel.

To the Judges of said Court:

The Libel and Complaint of PACIFIC CREOSOTING COMPANY, a corporation, organized under the laws of the State of Washington, and having its principal place of business in Seattle, in said District, against the THAMES & MERSEY MARINE INSURANCE COMPANY, LTD., a corporation, organized under the laws of Great Britain, and doing business in the State of Washington, in said District, in a cause of contract, civil and maritime, alleges as follows:

I.

That the libellant, being owner of a cargo of creo-

sote on or about the second day of June, 1908, caused the same to be shipped on the British bark "Sardhana," then lying at London, England, to be therein carried to Eagle Harbor, in the State of Washington, there to be delivered to this libellant, it paying freight for the same.

II.

On the second day of June, 1908, the libellant, in London, [2] England, through its agents, effected an insurance with the respondent on said cargo of creosote in drums, including packages and freight advanced, valued at Seven Thousand Four Hundred Fifty Pounds, in the sum of Nine Hundred Thirty-two Pounds, and on the same day through its said agents paid respondent the premium on said risk, to wit: Forty-four Pounds, Eighteen Shillings and Ten Pence, which sum was accepted by the respondent, and a policy of insurance issued and delivered to libellant, a copy whereof is hereto annexed marked "A" and made a part of this libel.

III.

On or about the last mentioned date the said bark "Sardhana," with said cargo on board, set sail upon her said voyage, and while in the course thereof, high gales and heavy seas were encountered, in which the ship rolled and labored heavily, and to such an extent that the cargo worked and became adrift, and many of the drums containing said creosote were damaged and a large quantity of said creosote escaped in the hold of the ship and was lost. That said ship arrived at the port of Eagle Harbor with her cargo badly damaged by the perils of the sea en-

countered on said voyage, and on November 18th, while lying in said port of Eagle Harbor and before discharging said cargo, a fire broke out in the after-'tween-decks of said ship, and burned the bulkhead forward of the lazaretto, the door thereof and a considerable portion of dunnage and other parts of said ship; that outside assistance was procured, and, after considerable difficulty the fire was extinguished. That on November 21, while discharging said cargo from said vessel, a lighter alongside of the ship, which was being used in discharging said cargo, and which was then loaded with 272 drums of said creosote, was capsized during a heavy gale, and the [3] said cargo on board the said lighter was precipitated into the sea; and heavy expenses were incurred by libellant in salving said cargo so lost from said lighter; that 268 drums thereof were recovered by said salvage operations, and the other four drums were lost. That the master caused said ship and cargo to be surveyed, and it was found that 741 drums were damaged and worthless; that 56,267.2 gallons of creosote were found to have been lost, and four additional drums filled with creosote were also found to be lost, all of the value of One Thousand Six Hundred Eighty-five Pounds, Twelve Pence; that libellant, in laboring to save said cargo lost from said capsized lighter, expended and paid out the sum of $1377.95, making a total loss and damage to said cargo, including said salvage expenses, of One Thousand Nine Hundred Sixty-nine Pounds, Two Shillings, Seven Pence—equivalent to $9,570 in gold coin of the United States.

IV.

The said damage to the cargo was caused entirely by the tempestuous weather aforesaid, and is not in any wise attributable to any unseaworthiness of the vessel. The damage to said cargo and the expenses incurred by libellant in salving same were such as are contemplated in and insured by the policy aforesaid.

V.

By reason of the premises, a general average adjustment was made, of which the respondents had notice, under which the respondent is liable to pay the libellant $1,197.20, being the insurance due upon the part of the cargo lost as aforesaid, and the sue and labor expenses incurred by libellant as aforesaid.

A copy of the said general average adjustment is hereto [4] annexed marked "B" and made a part of this libel.

VI.

The libellant has demanded of the respondent the said sum of $1,197.20, but respondent has refused to pay the same, or any part thereof, and the whole amount thereof is still due.

All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this court.

WHEREFORE, the libellant prays that a citation, according to the course and practise of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue to the said Thames & Mersey Insurance Company, Ltd., citing and admon-

ishing it to appear and answer all and singular the matters aforesaid; and that the Court will award judgment in favor of libellant for the sum of $1,197.-20 aforesaid, with interest and costs, and will give to the libellant such other and further relief as in law and justice it is entitled to receive.

PACIFIC CREOSOTING COMPANY,
By H. R. ROOD,
Vice-Pres.

BOGLE & SPOONER,
Proctors.

United States of America,
Western District of Washington.

H. R. Rood, being sworn, states that he is Vice-pres't of Pacific Creosoting Company, the libellant in the above and foregoing libel; that he has read the foregoing libel, knows the contents thereof and believes [5] the same to be true.

H. R. ROOD.

Sworn to and subscribed before me this 10th day of August, A. D. 1910.

[Seal] H. E. STEVENS,
Notary Public in and for the State of Washington, Residing in Seattle. [6]

Exhibit "A" [to Libel—Policy of Insurance].

No. 7284.
£ 932.

THAMES and MERSEY MARINE INSURANCE COMPANY, LIMITED.

WHEREAS, W. R. Lyon Lohr & Co. &/or as agents have represented to the THAMES and

MERSEY MARINE INSURANCE COMPANY, Limited, that they are interested in or duly authorized as Owner, Agent or otherwise to make the Insurance hereinafter mentioned and described with the said Company and have promised or otherwise obliged themselves to pay forthwith for the use of the said Company at the Office of the said Company the sum of Forty-four pounds eighteen shillings and ten pence, as a premium or consideration at and after the rate of Ninety Shillings per cent for such Insurance.

NOW THIS POLICY OF INSURANCE WITNESSETH That in consideration of the premises and of the said sum of Forty-four pounds eighteen shillings and ten pence the said Company promises and agrees with the said Co. their Executors, Administrators and Assigns that the said Company will pay and make good all such Losses and Damages hereinafter expressed as may happen to the subject matter of this Policy and may attach to this Policy in respect of the sum of NINE HUNDRED and THIRTY-TWO Pounds hereby insured which insurance is hereby declared to be upon CREOSOTE in drums including packages and FREIGHT ADVANCED valued at £7450 in the ship or vessel called the "Sardhana" whereof ——— is at present Master or whoever shall go for Master of the said ship or vessel lost or not lost at and from LONDON to EAGLE HARBOR, PUGET SOUND, or held covered at a premium to be arranged.

WARRANTED free from particular average, unless the vessel or craft or the interest insured be

stranded, sunk or on fire, or in collision with ice or any substance other than water (floating or non-floating), the collision to be of such a nature as may reasonably be supposed to have caused or lead to damage of cargo, or vessel put into a port of refuge or distress and discharge part or whole cargo, each craft or lighter *to deemed* a separate insurance, but to pay warehousing, forwarding and special charges if incurred, as well as partial loss arising from transhipment.

General average and salvage charges payable according to foreign statement or York-Antwerp rules, or 1890 Rules, if in accordance with the contract of affreightment. Including all risks of craft and boats. Including negligence and all liberties as per bill of lading and/or Charter Party.

Including all risks of transhipment and of craft, lighterage and/or any other conveyances, from the warehouse until on board the vessel, and from the vessel until safely delivered into warehouse, or destination in the interior, or of fire while awaiting shipment.

In case of deviation, change of voyage, or additional risk not specified, to be held covered upon terms to be arranged.

Including the Risk of craft, and/or raft to and from the vessel.

WARRANTED free of capture, seizure and detention and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of War. [7]

AND the said Company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandize aforesaid from the loading of the said goods or merchandize on board the said ship or vessel at as above and continue until the said goods or merchandize be discharged and safely landed at as above.

AND that it shall be lawful for the said ship or vessel to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to this insurance.

AND touching the adventures and perils which the capital stock and funds of the said company are made liable unto or are intended to be made liable unto by this insurance they are of the seas men of war fire enemies pirates rovers thieves jettisons letters of mart and counter-mart surprizals takings at sea arrests restraints and detainments of all Kings, Princes and people of what Nation condition or quality soever barratry of the Master and Mariners and of all other perils losses and misfortunes that have or shall come to the hurt detriment or damage of the aforesaid subject matter of this insurance or any part thereof. AND in case of any loss or misfortune it shall be lawful to the insured their factors servants and assigns to sue labor and travel for in and about the defence safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance the charges whereof the said company will bear in proportion to the sum hereby insured. AND it is ex-

pressly declared and agreed that no acts of the insurer or insured in recovering saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. AND it is declared and agreed that corn fish salt fruit flour and seed are warranted free from average unless general or the ship be stranded sunk or burnt, and that sugar tobacco hemp flax hides and skins are warranted free from average under five pounds per centum unless general or the ship be stranded sunk or burnt and that all other goods also freight are warranted free from average under three pounds per centum unless general or the ship be stranded sunk or burnt.

IN WITNESS WHEREOF the undersigned on behalf of the said company have hereunto set their hands in London, the second day of June, 1908.

Examined W— E. S. GEDZ,
for Director.

Countersigned— C. E. DICKINSON,
for Secretary. [8]

Exhibit "B" [to Libel—Statement of Particular Average on Creosote Oil in Drums, etc.].

STATEMENT
of
PARTICULAR AVERAGE
on
CREOSOTE OIL in DRUMS.

CASE of the BRITISH BARK "SARDHANA" from LONDON May 30th, 1908, to EAGLE HARBOR.

1908.

May 30th: This ship sailed from London with a

cargo of creosote in drums, bound to Eagle Harbor. High gales and heavy seas were encountered in which the ship rolled and labored heavily and to such an extent that the cargo worked and became adrift. Some of the drums were damaged and the creosote escaped into the hold of the ship.

November 9th: The ship arrived at Eagle Harbor.

November 18th: After part of the cargo had been discharged a fire broke out in the after 'tween-decks. An alarm was given. Outside assistance was procured and after considerable difficulty the fire was extinguished. Upon examination it was found that the bulkhead forward of the lazarette, the door thereof and considerable dunnage, were burned.

November 21st: A lighter alongside of the ship, loaded with 272 drums of creosote, was capsized during a heavy gale and the drums precipitated into about 6 fathoms of water.

A survey was called and recommendations were made to ascertain the number of damaged drums, the loss in weight of oil and the recovery of the 272 drums lost from the lighter. These recommendations were carried out with the following results: 741 drums were found damaged and worthless; 56,-267.2 gallons of oil were found to have been lost from these drums and all but 4 drums of the lighter load of 272 were recovered. The adjusters are advised that there is no ordinary loss in measurement of creosote in iron drums and that the 741 drums dam-

aged, for which claim is made, were all on board at the time of the fire.

EXTACT from PROTEST.

1908.

May 30th: This vessel sailed from London with a cargo of creosote in iron drums, bound for Eagle Harbor.

Nothing to be noted here occurred until

June 6th: When it was discovered that the carpenter's sounding rod was very slightly colored with creosote.

July 11th: The crew were employed placing extra checks amongst the cargo. [9]

July 15th: The moderate breeze that had been experienced freshened and the light sails were stowed away.

July 16th: A heavy squall struck the vessel and carried away the after leech of the inner jib. The upper and middle spanker brails were carried away while the sail was being taken in. New spanker brails were rove in.

July 18th: A strong breeze accompanied by a moderate sea and occasional heavy squalls, was encountered. Later in the day the ship rolled heavily in a high southwesterly swell.

July 20th: A heavy southwesterly swell was encountered in which the ship rolled severely. There was no wind at the time and the vessel would not steer.

July 28th: The strong breeze increased to a gale accompanied by a high sea in which the ship pitched heavily and shipped occasional heavy

seas on deck. Heavy seas smashed the starboard side light. Later the wind increased to a fresh gale accompanied by hard squalls of hail and rain. The ship pitched and rolled heavily.

July 29th: The gale continued as before; likewise the sea. The vessel again rolled heavily and pitched badly. Later the squalls blew with hurricane force. The ship rolled and pitched badly in a high confused sea and much water was shipped on deck. Towards night it was discovered that the cargo in the hold had commenced to work. The crew entered the hold from the lazarette and secured it as well as possible.

July 30th: The gale still continued. The ship rolled and pitched heavily and took much water on deck fore and aft. The cargo worked as before and the crew again entered the hold to secure it.

July 31st: The gale moderated the first part of the day but increased again later. Much water was shipped on deck. The cargo worked as before and the crew entered the hold through the ventilator hatch and secured it as well as possible.

August 1st: A fresh gale was experienced and the ship rolled and pitched heavily in a high beam sea. Again the cargo worked.

August 2nd: The wind constantly shifted in light squalls and the ship was frequently caught aback. No. 1 foot rope carried away and the main topgallant sail was sent down and No. 2 topgallant sail was bent.

August 4th: A high westerly swell was experienced in which the vessel rolled and pitched. An old

spanker boom was cut and used to chock off the cargo. This date the weather moderated and from this date until

August 7th: The crew were employed securing cargo.

August 9th: A moderate gale was encountered, accompanied by a high sea. The vessel rolled and pitched heavily.

August 11th: A strong gale was experienced, accompanied by hard squalls. Large quantities of water were shipped over all. [10]

August 12th: Similar conditions were encountered. The vessel continued to roll, labor and strain and ship large quantities of water on deck.

August 13th: The gale continued and was accompanied by a high confused sea.

August 18th: The barometer fell rapidly.

August 19th: Another gale was encountered accompanied by a high confused sea. The vessel labored and pitched heavily. The main topmast staysail burst while set.

August 25th: A hard gale was encountered accompanied by a heavy sea. Much water was shipped on deck. The cargo worked again badly.

August 26th: Similar conditions were experienced.

August 27th: A moderate gale was experienced in which the vessel rolled heavily. Again the barometer fell rapidly.

August 28th: The gale continued. The vessel rolled and strained.

August 30th: A high sea was experienced in which

the vessel labored heavily. The decks were constantly awash.

August 31st: A moderate gale was experienced. The decks were frequently awash and the cabin and deck houses were flooded. The cargo worked heavily.

September 1st: A moderate gale with hard squalls was experienced. The vessel shipped large quantities of water over all. The cargo worked heavily.

September 2nd: Similar conditions were encountered.

September 4th: A strong gale was experienced accompanied by a high sea in which the vessel labored and strained badly. The cargo worked as before. The hold was entered through the main ventilator and the drums were found to be adrift and were rolling about in all directions. It was impossible to secure the cargo until the weather moderated.

September 7th: A heavy sea struck the vessel and smashed the lighthouse on the starboard side.

September 14th: The crew were employed cutting up spare spars and blocking off the cargo with them.

September 26th: It was noticed by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote.

October 12th: The foot rope of the foretopgallant sail carried away.

November 2nd: A strong gale accompanied by a high sea was encountered. The ship labored heavily

and shipped much water on deck.

November 3rd: Similar conditions were encountered and the cargo again worked badly. [11]

November 6th: The ship was taken in tow by the tug "Wyadda."

November 9th: She arrived at Eagle Harbor.

November 17th: Stevedores commenced to discharge the cargo and they discharged 136 drums.

November 18th: Stevedores continued to discharge the cargo and at 5:00 P. M. finished for the day. 291 further drums were discharged. About 9:30 P. M. smoke was discovered issuing from the after hatch, by one of the crew who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship "Jupiter," the SS. "Hornelen," and the employees of the Pacific Creosoting Company who brought with them several chemical fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel) and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered.

AFFIDAVIT RE CAPSIZING OF LIGHTER.

State of Washington,
City of Seattle,—ss.

Frank D. Beal, being duly sworn, deposes and says:

That he is superintendent of the Pacific Creosoting Company's plant at Eagle Harbor; that on November 21, 1908, Pacific Barge Company's Scow #2 was lying moored to the British Bark "Sardhana," in the harbor opposite to the plant, and that there were Two Hundred and Seventy Two drums of creosote oil (272) upon this scow which had been discharged during the day.

That during the night of the 21st and 22nd a heavy gale sprang up, during which time the scow filled with water and capsized, precipitating all the drums into about six fathoms of water.

That fifteen of these drums were later recovered being evidently but partly filled with oil, and that the balance of the load, Two Hundred and Fifty-seven (257) filled drums are now lying on the bottom of the harbor alongside the "Sardhana."

(Signed) F. D. BEAL.

Subscribed and sworn to before me this second day of December, A. D. 1908.

(Signed) H. E. STEVENS,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

REPORT OF SURVEY.

On Barge P. B. No. 2 of Seattle, Washington.

At the request of the Pacific Creosoting Company,

I, the undersigned did hold survey upon the above described barge, November 23rd, 1908, and subsequent dates, for the purpose of ascertaining the cause of the capsizing of same, and the damage resulting to 272 drums of creosote oil, which formed the cargo of [12] said barge at the time of the accident.

By report obtained from the manager of the Creosoting Works and from officers of the Bark "Sardhana" it appears that the barge P. B. #2 was placed alongside the above named vessel, which vessel was moored in a sheltered part of Eagle Harbor, Wash., to receive a cargo of drums of creosote oil for transportation to the works, and that on the evening of November 21st, when the work was finished for the day 272 drums had been loaded on to said barge; and as is customary the barge left safely moored alongside the Bark to complete loading the next day, but during the night an unexpected gale sprang up, and before a tug could be obtained to move the barge, she collided heavily with the Bark which contact shifted the drums to one side, and caused the barge to capsize, thus spilling the whole of the 272 drums into the bay and leaving the barge bottom up.

RECOMMENDATIONS.

I recommended that bids be obtained from the local divers and a contract let for the recovery of the drums which recommendation was carried into effect with the following results:

253 drums recovered by divers.

15 light drums that floated, recovered by the launch and crew —— of the Pacific Creosoting Company.

268 Forward.

4 lost entirely, could not be located.

272 total number of drums that were on board the barge.

I further recommended that the barge be towed to some safe place, righted and put on the gridiron for examination.

This recommendation was carried out, and upon making a careful examination of said barge I found her to be undamaged, and making no water.

In my opinion the cause of the accident was entirely due to the part cargo of drums shifting on the deck of the barge, the harbor in which the ship and barge were moored is considered perfectly safe and protected from wind, but on this occasion an exceptionally heavy ground swell swept in.

Respectfully submitted

(Signed) F. WALKER,

Marine Surveyor.

Seattle, Washington, November 23rd to December 12th, 1908.

REPORT OF SURVEY.

On Cargo of Creosote Oil ex British Bark "Sardhana."

At the request of the Pacific Creosoting Company, I, the undersigned, did hold survey upon the above described cargo, previous to its removal from the vessel, on the 17th of November, 1908, and on subsequent dates, as same was being discharged, for the purpose of ascertaining the extent of damage alleged to have been sustained during the voyage from London, England, to Eagle Harbor, Wash.

By abstracts obtained from the vessel's log, it appears that she sailed from London on May 30th, 1908; that nothing worthy of note occurred until June 6th when it was noticed by the carpenter in taking soundings that traces of creosote appeared on the sounding rod. Various weather was encountered and on July 29th during a heavy gale and towards night it was discovered that the cargo had commenced to work. The crew entered the hold and [13] secured it as much as possible. July 30th, 31st and August 1st gale continued as before and cargo again worked. Crew did their best to secure same. From August 4th to August 7th the crew were employed securing cargo. From this date to August 25th various weather was encountered, and from the latter date to November 3rd a series of more or less severe gales were encountered, the cargo working more or less and an increase of liquid, which appeared to be creosote, was noticed at time of sounding the pump well. On November 6th the ship was taken in tow by the tug "Wyadda," and on November 9th she arrived at Eagle Harbor. November 17th commenced to discharge cargo, and on this date discharged 136 drums. On November 18th continued to discharge, and at 5 P. M. finished for the day, at which time 291 further drums were discharged. At about 9:30 P. M. smoke was discovered issuing from the after hatch by one of the crew who at once gave the alarm which was responded to by the crews of the ship "Jupiter," the SS. "Hornelen," and the employees of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below

through the lazarette and located the fire at the bulkhead separating the after 'tween-deck from the lazarette. The after 'tween-decks were still full of cargo, but after considerable trouble the fire was extinguished, and it was then discovered that the wooden bulkhead and door to same, together with a quantity of dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered. For further particulars of the voyage, see ship's log and protest.

Upon making a careful examination of the cargo on November 17th, previous to commencing discharge, and at various dates during the discharge of same, I found the drums to be well stowed and dunnaged.

The cargo consisted of 2,753 drums of creosote, of which 2,012 drums were discharged in good condition, the remaining 741 drums were more or less dented, damaged, and in a leaky condition, 25 being entirely empty.

2,012	Drums	full and in good order
716	"	damaged and partly empty
25	"	damaged and entirely empty
2,753	total.	

After vessel was discharged the officials of the Creosoting Company emptied the 741 damaged drums and measured the amount obtained from same, which proved to be 23,650 galls., and as these drums when full contained 109 2/10 galls. each, which equals 80,917.2 galls., the loss is shown as follows:

80,917.2 galls. when shipped
23,650 " discharged

56,267.2 " total loss

The 741 damaged drums are entirely unfit for further use and have no salable value.

The loss of 56,267.2 galls. of creosote does not include the 4 drums lost by the capsizing of barge P. B. No. 2 on the night of November 21st, and reported on in separate report. These, however, are included in the 2,012 drums discharged in good condition.

Respectfully submitted,

(Signed) F. WALKER,
Marine Surveyor.

Seattle, Wash., November 17th—December 28th, 1908.

ADJUSTERS' NOTE:

United States gallons=46889-1/3 Imperial Galls. [14]

	Mark. B D O ENG. Drums.	Contents.	Mark. C ENG. Drums.	Contents.
Bare invoice cost at Works.	£309-3-9	£206-9-8	£2786-6-5	£2507-13-9
Cost of filling drums.....		12-1-0		118-14-11
Cost of putting on board and advanced freight....	25-8-11	111-13-0	133-9-9	572-17-7
Insurance premium	15-2-5	14-18-4	130-17-11	143-8-6
Cost of Consular Invoice..	2-7	2-7	2-7	2-7
Total invoice cost and advanced freight	£349-17-8	£345-4-7	£3050-16-8	£3342-17-4

Or. Mark.	Merchandise Shipped.	Invoice Value & Advanced Frt.	Insured Value.	Insured Value of Each Drum & Gal.
B D				
O	255 Drums	£ 349–17–8	£ 367–14–3	£1–8–10
ENG.	23142 Gals. Creosote	£ 345– 4–7	£ 362–16–5	£0–0–3.763
C	2498 Drums	£3050–16–8	£3206– 5–7	£1–5–8
ENG.	227992 Gals. Creosote	£3342–17–4	£3513– 3–9	£0–0–3.698
		£7088–16–3	£7450– 0–0	

SHIPMENT & OUT-TURN.

Mark.		Shipped.	Delivered.	Short.
B D	Drums	255 pkgs.	247 pkgs.	8 pkgs.
O				
ENG.	Creosote	23142 Gals.	22635.78 gals.	506.22 gals.

Note: If 741 drums lost 46889–1/3 gallons, then 8 drums lost in proportion 506.22 gallons. No record was secured of the contents short on each mark.

C	Drums.	2498 Pkgs.	1761 Pkgs.	737 Pkgs.
Eng.	Creosote	227992 gals.	181243.81 gals.	46748.19 gals.

Imperial gallons.

INSURED WITH THE CLAUSES:

"Warranted free from Particular Average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire, or in collision with ice or any substance other than water (floating or non-floating), the collision to be of such a nature as may reasonably be supposed to have caused or led to damage of cargo, or vessel put into a port of refuge or distress and discharge part or whole cargo, each craft or lighter to be deemed a separate insurance, but to pay warehousing, forwarding and special charges, if incurred, as well as partial loss arising from transhipment. **[15]**

"Including all risks of transhipment and of craft, lighterage and/or any other conveyances, from the warehouse until on board the vessel, and from the vessel until safely delivered into warehouse, or destination in the interior, or of fire while waiting shipment.

8	Drums of the Mark	B. D.	at £1–8–10	per drum	£ 11–10–8
506.22	Gals. " " "	B. D.	" £0–0–3.763	per gal.	£ 7–18–9
737	Drums " " "	C.	" £1–5– 8	per drum	£ 945–16–4
46748.19	Gals. " " "	C.	" £0–0–3.698	per gal.	£ 720– 6–3
					£1685–12–0

SUE & LABOR CHARGES:

Henry Finch,			
For professional services in raising creosote tanks at Eagle Harbor, Wash. as per memo. agreement dated Dec. 1st., 1908, 253 Drums raised at $4. each		$1012.00	
J. N. Bogart,			
To 4½ days with driver hoisting submerged drums from Harbor bottom...		45.00	
Pacific Creosoting Company,			
To launch 2 hours at $2.50, and one man at 25¢, towing scows from diving outfit to gridirons and return.....	$5.50		
To launch 5 hours at $2.50 and 3 men at 25¢ each, picking up drums adrift in Harbor	16.25		
To launch 5 hours at $2.50 and 2 men 5 hours each at 25¢ picking up drums in Harbor as above.....	15.00	36.75	
Pacific Creosoting Company,			
Blacksmith 3 hrs. fixing hoisting gear, 3 laborers 3 days each handling drums on scow	19.20		
Rent of launch and man tending scow and driver while recovering sunken drums, 4–½ days $10.....	45.00	64.20	
		$1157.95	£1685–12–0

[16]

Forward		$1157.95	£1685–12–0
Crosby Tow Boat Co.,			
To towing scow from Seattle to Eagle Harbor $10.00			
To rent of scow 5 days at $10. per day	50.00	60.00	
Frank Walker,			
To survey report on cargo of Br. B'k. "Sardhana" dated November 17th—December 28th, 1908		75.00	
Frank Walker,			
To survey and report on scow P. B. No. 2 dated November 23rd to December 12th, together with consultations at various dates.....		25.00	
For extended protest		25.00	
For professional services and advice including consultations with consignees and surveyor, and for this statement		35.00	
		$1377.95	£1685–12–0
$1377.95 at Exchange $4.86.....			283–10–7
			£1969– 2–7

VALUATION IN POLICIES £7450.

Thames & Mersey Marine Insurance Co. Ltd.,	£ 932.	pays	£ 246– 6–9
Underwriters at Lloyds	£1291	"	£ 341– 4–7
Underwriters at Lloyds	£5227	"	£1381–11–3
Seattle, Washington, May 18th, 1909.	£7450.		£1969– 2–7

Per pro. JOHNSON & HIGGINS,
GERRARD CREWE,
Atty.,
Average Adjusters.

[Indorsed]: Libel. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 10, 1910. R. M. Hopkins, Clerk. [17]

[Title of Court and Cause.]

Answer of Respondent.

Comes now the Thames & Mersey Marine Insurance Company, Ltd., respondent herein, and for answer to the libel of the Pacific Creosoting Company on file herein alleges:

I.

That it admits the allegations contained in paragraph I of said libel.

II.

That it admits the allegations contained in paragraph II of said libel except that it does not admit that Exhibit "A" is a true copy of the policy of insurance mentioned in said paragraph, in that said policy as executed contained various interlineations and erasures and clauses in different types which, respondent alleges, are material in enabling the Court to construe such policy, and it, therefore, prays for the production of the original policy of insurance upon the trial of this cause. Subject to these limitations, however, it admits the verity of said Exhibit "A." [18]

III.

Answering the allegations contained in paragraph III of said libel, respondent is ignorant as to the matters and things therein contained and can, therefore, neither admit nor deny the same, and on this ground it calls for proof thereof.

IV.

Answering the allegations contained in paragraph IV of said libel respondent denies that the damage

to said cargo, or the expenses incurred by libelant in salving the same, were such as were contemplated in or insured by the policy aforesaid. It is ignorant as to the remaining matters and things in said paragraph contained and can, therefore, neither admit nor deny the same, and on this ground it calls for proof thereof.

V.

Answering the allegations contained in paragraph V of said libel respondent denies that under the average adjustment therein mentioned, or otherwise or at all, it is liable to pay the libelant the sum of $1,197.20, or any sum whatever. It also denies that the adjustment therein mentioned was a general average adjustment. It is ignorant as to the allegation that the adjustment therein alleged was made, and as to whether Exhibit "B" attached to said libel is a true copy of said adjustment and can, therefore, neither admit nor deny the same, on which ground it calls for proof thereof.

VI.

Answering the allegations contained in paragraph VI of said libel respondent denies that the sum of $1,197.20, or any sum, is due from it to the libelant, and denies that all and singular the premises are true. Otherwise it admits the allegations of said paragraph VI. [19]

VII.

And as a further and separate defense to said libel respondent alleges:

That by the terms of the aforesaid policy of insurance, the same was warranted free from particular

average, subject to certain exceptions, that libelant's loss, if such loss there was, was a particular average loss, and that the same was not within any of the aforesaid exceptions.

VIII.

And as a further and separate defense to said libel respondent alleges:

That the aforesaid policy of insurance was a policy made and entered into in the city of London, in the Kingdom of Great Britain, and was and is governed by the law of that Kingdom; that under the law of said Kingdom a ship must be "on fire" as a whole, in order to delete the F. P. A. (free from particular average) warranty in policies like that now sued on under the "on fire" clause therein contained; that the British bark "Sardhana" was not on November 18th, 1908, or at any other time, on fire as a whole, and hence was not "on fire" under the terms of the policy in suit, and that hence respondent is not liable under the terms of said policy for the particular average losses alleged to have been suffered by the libelant.

IX.

And as a further and separate defense to said libel respondent alleges:

That the aforesaid policy of insurance was a policy made and entered into in the city of London, in the Kingdom of Great Britain, and was and is governed by the law of that Kingdom; that under the law of said Kingdom, the British bark "Sardhana" was not on November 18th, 1908, or at any other time, [20] "on fire" under the terms of the policy in suit, and hence respondent is not liable under the terms of said

policy for the particular aver .ge losses alleged to have been suffered by the libelant.

WHEREFORE, respondent prays that said libel may be dismissed with costs.

BRADY & RUMMENS,
Proctors for Respondent.
McCLANAHAN & DERBY,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

Louis Rosenthal, being first duly sworn, on oath deposes and says: That he is the Pacific Coast Agent of the Thames & Mersey Marine Insurance Company, Ltd., respondent herein, and has general charge of its business on all parts of the Pacific Coast.

That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief. That he makes this verification upon the information received from his agents in Seattle, Washington, and from the home offices of the respondent in London, England, and that he makes the same on behalf of said respondent having due authority so to do.

LOUIS ROSENTHAL.

Subscribed and sworn to before me this 25th day of January, 1911.

[Seal] M. V. KIRKETERP,
Notary Public in and for the City and County of San Francisco, State of California. [21]

Interrogatories Propounded to Libelant by Answer.

The respondent, in pursuance of Admiralty Rule 32 in such cases made and provided, propounds the following interrogatories to the libelant herein:

1. Please state what "the other parts of the ship," alleged to have been burned in paragraph III of the libel, were.

2. Was the whole of "the bulkhead forward of the lazarette," referred to in said paragraph, burned, and, if not, state how much of it was burned?

3. Was the whole of the door of said bulkhead burned, and, if not, state how much of it was burned?

4. How much dunnage referred to in said paragraph III was burned?

5. Was there a survey for fire damage on said ship held because of the fire referred to in said paragraph III, and, if so, please state when it was made, by whom, and attach a copy of the report of survey?

6. Was the damage caused by said fire such as to require any repairs, and, if so, state what they were, who made the repairs, and the cost thereof?

7. State in detail what "outside assistance" was procured to extinguish the fire referred to in said paragraph III.

8. State in detail the difficulties encountered in extinguishing the fire referred to in said paragraph III.

9. State the names and addresses of the men who extinguished the said fire so far as known to you.

BRADY & RUMMENS,
Proctors for Respondent.
McCLANAHAN & DERBY,
Of Counsel. [22]

Due and full service of within Answer and Interrogatories acknowledged this 30th day of Jan., 1911.

BOGLE, MERRITT & BOGLE,
Proctors for Libelant.

[Indorsed]: Answer of Respondent and Interrogatories. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 31, 1911. R. M. Hopkins, Clerk. [23]

[Title of Court and Cause.]

Answers of Pacific Creosoting Company, a Corporation, to the Interrogatories Propounded to It in This Cause.

1. To the first interrogatory libelant says: That the "other parts of the ship" which were burned, as alleged in paragraph III of the libel, were the floors and ceiling of said ship near said bulkhead.

2. To the second interrogatory libelant says: That about two-thirds of the said bulkhead was burned and charred.

3. To the fifth interrogatory libelant says: That no survey for such fire damage was held to its knowledge.

4. To the sixth interrogatory libelant says: That the damage caused by said fire to the said ship, was such as to require repairs; that such repairs consisted of removing the burned bulkhead and building a new one in its place. These repairs were made by the ship's carpenter. Libelant is unable to state the cost of such repairs.

5. To the seventh interrogatory libelant says:

That the "outside assistance" which was procured to extinguish the fire was [24] a portion of the crew of the steamer "Hornelon," and also certain employees of the libelant working at its plant at Eagle Harbor.

6. To the eighth interrogatory libelant says: That the difficulties encountered in extinguishing the fire were that stores were piled on one side of the bulkhead, and drums of creosote, dunnage, etc., on the other, and that the lumber was saturated with creosote, making the same very inflammable, and that it required hard work on the part of the crew of the "Sardhana" and the persons so assisting them to extinguish the fire.

PACIFIC CREOSOTING CO.,
By its H. E. STEVENS,
Secy.

BOGLE, MERRITT & BOGLE,
Proctors for Libelant. [25]

United States of America,
Western District of Washington,—ss.

H. E. Stevens, being first duly sworn, on oath, says: That he is the secretary of the Pacific Creosoting Company, a corporation, libelant herein, and makes this verification of the foregoing Answers to the interrogatories in behalf of said libelant; that he has read the foregoing answers to interrogatories, and the same are true.

H. E. STEVENS,
Secy.

Subscribed and sworn to before me this 15th day of May, A. D. 1911.

[Notarial Seal] F. T. MERRITT,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within Answers to Interrogatories this 15th day of May, 1911, and receipt of a copy thereof, admitted.

BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Answers of Libelant to the Interrogatories Propounded by Respondent. Filed in the U. S. District Court, Western Dist. of Washington. May 16, 1911. R. M. Hopkins, Clerk. [26]

[Title of Court and Cause.]

Amended Answer of Libelant to the Fifth Interrogatory Propounded to It in This Cause.

For its Amended Answer to the fifth interrogatory propounded to libelant in this cause, it says: A survey for said fire damage on said ship was held because of the fire referred to in Paragraph 3 of the libel herein; such survey was made November 20, 1908, by one Frank Walker, a marine surveyor of Seattle, State of Washington.

PACIFIC CREOSOTING COMPANY.
By H. E. STEVENS,
Its Secretary.

BOGLE, MERRITT & BOGLE,
Proctors for Libelant. [27]

United States of America,
Western District of Washington,—ss.

H. E. Stevens, being first duly sworn on oath, deposes and says: That he is the secretary of the Pacific Creosoting Company, a corporation, libelant herein, and makes this verification of the foregoing Amended Answer to the fifth interrogatory in behalf of said libelant; that he has read the foregoing Amended Answer to said fifth interrogatory, and the same is true; affiant further says that this Amended Answer to said fifth interrogatory is made for the reason that at the time of making the original answer to said interrogatory, he did not know and had never been informed that any such survey had been made, but that on this 26th day of May, 1911, affiant was informed by said Frank Walker that he had made such survey at the time above stated, which was the first knowledge or information affiant had of said fact, and as he verily believes, is the first that any officer of said corporation knew of such survey.

H. E. STEVENS.

Subscribed and sworn to before me this 26th day of May, A. D. 1911.

[Notarial Seal] F. T. MERRITT,
Notary Public in and for the State of Washington,
Residing at Seattle. [28]

Service of within Amended Answer to interrogatory this 26th day of May, 1911, and receipt of a copy thereof, admitted.

BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Amended Answer of Libelant to the Fifth Interrogatory Propounded to It in this Cause. Filed in the U. S. District Court, Western Dist. of Washington. May 26, 1911. R. M. Hopkins, Clerk. [29]

[Title of Court and Cause.]

Exceptions to Libel.

Comes now the Thames & Mersey Marine Insurance Company, Ltd., respondent herein, and excepts to the libel of the Pacific Creosoting Company, libelant herein, upon the following grounds:

1. In that it appears from said libel that the loss and damage for which recovery is sought constitute a particular average loss, and it does not sufficiently appear from the facts alleged in said libel that the loss and damage was covered by the policy of insurance annexed to said libel and marked Exhibit "A."

2. In that it does not sufficiently appear from said libel what part, if any, of said loss and damage was covered by the terms of said policy.

3. In that the insurance affected by said policy is warranted free from particular average, subject to certain exceptions, and that it does not sufficiently appear from said libel that the cause of action is within said exceptions. [30]

WHEREFORE, respondent prays that said libel may be dismissed with costs.

Dated October —, 1910.

BRADY & RUMMENS,
Proctors for Respondent.

Due and full service of within Exceptions to Libel acknowledged this 22d day of Oct., 1910.

BOGLE, MERRITT & BOGLE,
Attorneys for Libelant.

[Indorsed]: Exceptions to Libel. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 22, 1910. R. M. Hopkins, Clerk. **[31]**

[Title of Court and Cause.]

Exceptions to Interrogatories [Addressed to Libelant].

EXCEPTIONS TO THE INTERROGATORIES ADDRESSED TO THE LIBELLANT BY THE RESPONDENT HEREIN.

I.

The said libellant hereby excepts to the first interrogatory for the reason that said interrogatory does not call for evidence in support of respondent's defense, but calls for libellant's evidence in support of its libel herein; and said interrogatory is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

II.

The libellant hereby excepts to the second interrogatory for the reason that said interrogatory does not call for evidence in support of respondent's defense, but calls for libellant's evidence in support of its libel herein; and the same is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

III.

The libellant hereby excepts to the third interrogatory for the reason that said interrogatory does not call for evidence in support of respondent's defense, but calls for libellant's evidence [32] in support of its libel herein; and the same is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

IV.

The libellant hereby excepts to the fourth interrogatory for the reason that said interrogatory does not call for evidence in support of respondent's defense, but calls for libellant's evidence in support of its libel herein; and the same is an attempt on the part of the respondent to find out in advance what libellant's evidence will be. And also upon the further ground that it is irrelevant and immaterial as to how much dunnage was burned.

V.

The said libellant hereby excepts to the fifth interrogatory for the reason that said interrogatory does not call for evidence in support of respondent's defense, but calls for libellant's evidence in support of its libel herein, and also upon the further ground that the said interrogatory calls for the names of libellant's witnesses herein and for a copy of documents not in issue and which under the rules of this court libellant cannot be required to produce in answer to interrogatories, and upon the further ground that the said interrogatory is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

VI.

The said libellant excepts to the sixth interrogatory for the reason that the same does not call for evidence in support of respondent's defense, but calls for the names of libellant's witnesses and evidence in support of the libel herein, and is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

VII.

Libellant excepts to the seventh interrogatory for the reason [33] that the same does not call for evidence in support of respondent's defense, but calls for the names of libellant's witnesses and the evidence in support of its libel herein, and is an attempt on the part of respondent to find out in advance what libellant's evidence will be and who its witnesses will be.

VIII.

Libellant excepts to the eighth interrogatory for the reason that the same does not call for evidence in support of respondent's defense, but calls for libellant's evidence in support of its libel herein and is an attempt on the part of respondent to find out in advance what libellant's evidence will be.

IX.

Libellant excepts to the ninth interrogatory for the reason that the same calls for the names and addresses of libellant's witnesses, and is an attempt on the part of respondent to find out in advance the names of libellant's witnesses and what its evidence will be.

In all of which particulars the libellant insists

that the said interrogatories are improper to be propounded to the libellant herein and that the libellant should not be required to answer either of said interrogatories, and that each and all thereof should be stricken out.

BOGLE, MERRITT & BOGLE,
Proctors for Libelant.

Service of within exceptions this 15th day of Feby., 1911, and receipt of a copy thereof, admitted.

BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Exceptions to Interrogatories. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 16, 1911. R. M. Hopkins, Clerk. **[34]**

[Title of Court and Cause.]

Exceptions to Answer.

I.

The libellant excepts to the further and separate defense set forth in Article 7 of respondent's answer herein, upon the grounds that the same does not allege facts sufficient to constitute a defense to the libel herein, but the same is a mere conclusion and is impertinent, the Court having already in this cause decided adversely to respondent's contention in said Article.

II.

The libellant excepts to the further and separate defense set forth in Article 8 of respondent's answer herein, upon the grounds that the same does

not allege facts sufficient to constitute a defense to the libel herein, but the same is a mere conclusion and is impertinent, the Court having already in this cause decided adversely to respondent's contention in said Article.

III.

The libellant excepts to the further and separate defense set forth in Article 9 of respondent's answer herein, upon the grounds that the same does not allege facts sufficient to constitute a defense to the libel herein, but the same is a mere conclusion and is impertinent, the Court having already in this cause decided [35] adversely to respondent's contention in said Article.

In which particulars the libellant insists that the respondent's said answer is irrelevant, insufficient, imperfect and impertinent;

WHEREFORE, the libellant excepts to and prays that the said allegations of said answer excepted to as aforesaid may be expunged with costs.

BOGLE, MERRITT & BOGLE,
Proctors for Libellant.

Service of within Exceptions this 15th day of Feby., 1911, and receipt of a copy thereof, admitted.

BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Exceptions to Answer. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 16, 1911. R. M. Hopkins, Clerk. [36]

[Title of Court and Cause.]

Order on Exceptions to Answer and to Interrogatories.

The above-entitled matter having been duly submitted to the Court upon the exceptions of the said libellant to paragraphs 7, 8 and 9 of the answer of respondent herein, and upon the exceptions of said libellant to the interrogatories heretofore propounded and filed by the said respondent, and the Court having duly considered the said exceptions, and having heretofore filed its memorandum decision upon the said exceptions,

NOW, THEREFORE, in accordance with said memorandum decision, IT IS HEREBY ORDERED that the said exceptions of said libellant to paragraphs 7 and 9 of the said answer be and the same are hereby sustained, and that the said exceptions to paragraph 8 of said answer be and the same are hereby overruled.

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED that the said exceptions to interrogatories numbers 3, 4 and 9 propounded by said respondent be and the same are hereby sustained, and that the said exceptions to interrogatory number 5, in so far as the same calls for the production of a copy of the report of any survey which may have been made, be and the same is hereby sustained, but otherwise said exceptions are overruled as to said Interrogatory 5. [37]

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said exceptions to interroga-

tories, 1, 2, 6, 7 and 8 be and the same are hereby overruled.

The said libellant excepts to that portion of the foregoing order overruling its said exceptions, and the said respondent hereby excepts to that portion of the foregoing order sustaining the said exceptions, which exceptions of the respective parties are hereby allowed.

DONE in open court this 29th day of April, 1911.

GEORGE DONWORTH,
Judge.

O. K. as to form.

BRADY & RUMMENS.

NOTE: The above order was signed in order to carry out Memorandum Decision filed by Judge Hanford.

GEORGE DONWORTH,
Judge.

[Indorsed]: Order on Exceptions to Answer and to Interrogatories. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 29, 1911. R. M. Hopkins, Clerk. **[38]**

[Title of Court and Cause.]

Order to Transmit Original Exhibits.

Now, on this 5th day of August, 1914, upon motion of Messrs. Brady & Rummens, Edmund B. McClanahan and S. Hasket Derby, proctors for respondent and appellant, and for sufficient cause appearing, it is ordered that the Libelant's Exhibits "A," "B," "C," "D," "E," "E1," "E2,"

"E3," "F," "G," "H," "I," "J," "K," "L," and "M," and Respondent's Exhibits 1, 2 and 3, filed and introduced as evidence upon the trial of this cause, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist of Washington. August 5, 1914. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy. **[39]**

[Title of Court and Cause.]

Direct Interrogatories to be Propounded to M. I. Helman.

Direct interrogatories to be propounded to M. I. Helman, at Wenatchee, Washington, a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States, for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, against the Thames and Mersey Marine Insurance Company, Ltd., respondent, on behalf of said libelant, in accordance with the stipulation hereto annexed:

Direct Interrogatory No. 1:

State your name, age, residence and occupation.

Direct Interrogatory No. 2:

What was your occupation in the month of November, 1908?

Direct Interrogatory No. 3:

If your answer to Interrogatory No. 2 is that you were the chief engineer at the plant of the Pacific Creosoting Company, a corporation, libelant herein, state how long you had been in the employ of the Pacific Creosoting Company, and how long you remained in their employ after November, 1908.

[40]

Direct Interrogatory No. 4:

State where you were on the evening of November 18, 1908, at about 9:30 o'clock.

Direct Interrogatory No. 5:

State whether or not the British bark "Sardhana" was anchored in Eagle Harbor on November 18, 1908, and if so, state where the said ship was anchored, and what she was engaged in doing on said date.

Direct Interrogatory No. 6:

Did you hear a fire-alarm sounded from the British bark "Sardhana" at about 9:30 o'clock on said November 18, 1908?

Direct Interrogatory No. 7:

If you answer Interrogatory No. 6 in the affirmative, state just where you were located when you heard said fire-alarm.

Direct Interrogatory No. 8:

If you answer Direct Interrogatory No. 6 in the affirmative, state, as near as you can, the distance from the place where you were located at the time

you heard the said fire-alarm to the place where the said Bark was anchored on said night.

Direct Interrogatory No. 9:

If you answer Interrogatory No. 6 in the affirmative, state just what you did after hearing the said fire-alarm.

Direct Interrogatory No. 10:

State whether or not you went aboard the said bark on the evening of November 18, 1909, after hearing the said fire-alarm.

Direct Interrogatory No. 11:

If you answer Interrogatory No. 10 in the affirmative, state how you got aboard the bark, and the approximate time which elapsed from the time you heard the fire-alarm until you were aboard the said bark. **[41]**

Direct Interrogatory No. 12:

If in answer to Interrogatory No. 10 you state that you went aboard the said bark, state just what evidence there was of a fire aboard when you arrived, and also state what efforts were being made to extinguish the fire, the number of men engaged, and the means employed in said work.

Direct Interrogatory No. 13:

State, if you know, what portions of the ship were burned by said fire.

Direct Interrogatory No. 14:

State whether or not any outside assistance from other ships in Eagle Harbor was offered or used in extinguishing the said fire.

Direct Interrogatory No. 15:

If you answer the preceding interrogatory in the

affirmative, state what other ships offered assistance, and the approximate number of men from the crews of said ships who assisted in putting out the fire.

Direct Interrogatory No. 16:

If you answer Interrogatory No. 14 in the affirmative, state where the other ships were anchored with reference to the position of the "Sardhana."

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant. [42]

[Cross-interrogatories to be Propounded to M. I. Helman.]

[Title of Court and Cause.]

Cross-interrogatories to be propounded to M. I. Helman, at Wenatchee, Washington, a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States, for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, against the Thames and Mersey Marine Insurance Company, Ltd., respondent, on behalf of said respondent, in accordance with the stipulation hereto annexed:

Cross-interrogatory No. 1: If in answer to direct interrogatory 13 you have stated that any part of the bark "Sardhana" was burned by said fire, please state when it was that you first saw such burned portions of said ship.

Cross-interrogatory No. 2: If in answer to direct interrogatory 13 you have stated that any part of said bark "Sardhana" was burned by fire, please give your present judgment of the area so burned, that is, if you have answered that the bulkhead was burned, state the width of the burned area and the height, and also if you have answered that the ceiling and floor was burned, state your judgment of the extent thereof in square feet. **[43]**

Cross-interrogatory No. 3: If in answer to direct interrogatory 13 you have stated that the bulkhead door was a part of said bark burned by said fire, please state if the entire door was burned or, if not, just how much was burned, and state in this connection whether the burning of the door was such as to destroy its use as such.

Cross-interrogatory No. 4: If in answer to direct interrogatory 13 you have named some portion of the bark known by you personally to have been burned by said fire, please state whether or not you have received from anyone connected with this case, or with this deposition, any word or statement apprising you of any matter or thing connected with or concerning the extent or area of the burning done by said fire, either to the floor, ceiling, bulkhead or bulkhead door of said bark.

Cross-interrogatory No. 5: Have you at any time learned by word of mouth or by writing of any kind that the bulkhead door of the "Sardhana"

is now in the city of Seattle? If so, please state all that you have so learned and, if the knowledge came to you through written communication, please attach same hereto as part of your deposition, or give your reason for an inability to do so.

Cross-interrogatory No. 6: If in answer to direct interrogatory 10 you have stated that you saw smoke coming from the cabin, please state whether you went below at any time during the progress of the fire or whether you remained on deck.

Cross-interrogatory No. 7: Is it true that there was a good deal of excitement on board the bark "Sardhana" at the time of the fire? [44]

Cross-interrogatory No. 8: If in answer to direct interrogatory 10 you have made statements with reference to the said fire, and the efforts made to extinguish the same, is it not a fact that your observations of the matters testified to were obtained while you were on the deck of the "Sardhana" and not while you were below?

Cross-interrogatory No. 9: If in answer to direct interrogatory 14 you have stated that outside assistance from other ships was offered or used, please state from your personal knowledge all that you saw done by such outside assistance in the actual extinguishment of said fire.

Cross-interrogatory No 10: If in answer to direct interrogatory 11 you have stated how you got

aboard the bark, please state who accompanied you at that time.

BRADY & RUMMENS,
McCLANAHAN & DERBY,
Proctors for Respondent. **[45]**

[Title of Court and Cause.]

Answers of Witness M. I. Helman to Direct and Cross-interrogatories Hereto Attached.

M. I. Helman, a witness for libelant in the above-entitled cause, being first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said cause, made answer to the said respective Direct Interrogatories and Cross-interrogatories, as follows:

Answering Direct Interroga*tion* No. 1, witness says: M. I. Helman; age 58; Wenatchee, Washington; Engineer City Pumping Plant.

Answering Direct Interrogatory No. 2, witness says: Chief Engineer of the Pacific Creosoting Company.

Answering Direct Interrogatory No. 3, witness says: About two or three years prior to 1908, and remained until February, 1911.

Answering Direct Interrogatory No. 4, witness says: I was living in one of the company cottages, and was at home at that time.

Answering Direct Interrogatory No. 5, witness says: It was. I should say it was about six hundred feet from, and parallel with the loading dock. **[46]** Unloading a cargo of creosote.

Answering Direct Interrogatory No. 6, witness says: I did.

Answering Direct Interrogatory No. 7, witness says: I was at home.

Answering Direct Interrogatory No. 8, witness says: I think that it was about eight hundred yards, in a direct line.

Answering Direct Interrogatory No. 9, witness says: Several of us secured a rowboat, and went aboard the "Sardhana."

Answering Direct Interrogatory No. 10, witness says: Yes.

Answering Direct Interrogatory No. 11, witness says: Went up the side of the bark. I do not remember whether by means of a rope-ladder or stairs. Probably one-half hour.

Answering Direct Interrogatory No. 12, witness says: When I reached the deck I saw smoke issuing from the after-hatch. Efforts were being made to extinguish the fire by the use of fire-extinguishers. Also men were using buckets with rope attached to them, hauling water over the side of the bark. Probably twenty or twenty-five men.

Answering Direct Interrogatory No. 13, witness says: It has been so long since the fire that I do not remember.

Answering Direct Interrogatory No. 14, witness says: I was told that the S. S. "*Horlmelon*" was rendering assistance.

Answering Direct Interrogatory No. 15, witness says: I do not know.

Answering Direct Interrogatory No. 16, witness

says: I do not know.

Answering Cross-interrogatory No. 1, witness says: I did not state that any particular part was burned.

Answering Cross-interrogatory No. 2, witness says: I do not know.

Answering Cross-interrogatory No. 3, witness says: For answer to this I refer to answer # 1 in cross-interrogatory. **[47]**

Answering Cross-interrogatory No. 4, witness says: See answer to cross-interrogatory #1.

Answering Cross-interrogatory No. 5, witness says: I have not.

Answering Cross-interrogatory No. 6, witness says: I did go below during the progress of the fire.

Answering Cross-interrogatory No. 7, witness says: I do not think that there was more than ordinary excitement on an occasion of that kind.

Answering Cross-interrogatory No. 8, witness says: As stated before, I saw smoke issuing from the after-hatch, and when I went below I saw smoke in the cabin. I saw no other evidence of fire, and immediately returned to the deck.

Answering Cross-interrogatory No. 9, witness says: I have no personal knowledge of any assistance.

Answering Cross-interrogatory No. 10, witness says: There was one by the name of A. O. Powell, Jr., and another by the name of Frank Kesce. I am not certain whether there were any others accompanying me or not.

M. I. HELMAN.

Subscribed and sworn to before me this 12th day of March, A. D. 1913.

[Seal] W. W. GRAY,
Notary Public in and for the State of Washington,
Residing at Wenatchee, in said State. [48]

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Mar. 17, 1913. Frank L. Crosby, Clerk, By E. M. L., Deputy. [49]

[Title of Court and Cause.]

Direct Interrogatories to be Propounded to Fred N. Beal.

Direct Interrogatories to be propounded to Fred N. Beal, at Portland, Oregon, a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States, for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, against the Thames and Mersey Marine Insurance Company, Ltd., respondent, on behalf of said libelant, in accordance with the stipulation hereto annexed:

Direct Interrogatory No. 1:

State your name, age, residence and occupation.

Direct Interrogatory No. 2:

What was your occupation in the month of November, 1908?

Direct Interrogatory No. 3:

If your answer to Interrogatory No. 2 is that you

were the storekeeper at the plant of the Pacific Creosoting Company, a corporation, libelant herein, state how long you had been in the employ of the Pacific Creosoting Company, and how long you remained in their employ after November, 1908.

Direct Interrogatory No. 4:

State where you were on the evening of November 18, 1908, at about 9:30 o'clock. [50]

Direct Interrogatory No. 5:

State whether or not the British bark "Sardhana" was anchored in Eagle Harbor on November 18, 1908, and if so, state where the said ship was anchored, and what she was engaged in doing on said date.

Direct Interrogatory No. 6:

Did you hear a fire-alarm sounded from the British bark "Sardhana" at about 9:30 o'clock P. M. on said November 18, 1908?

Direct Interrogatory No. 7:

If you answer Interrogatory No. 6 in the affirmative, state just where you were located when you heard said fire-alarm.

Direct Interrogatory No. 8:

If you answer Direct Interrogatory No. 6 in the affirmative, state, as near as you can, the distance from the place where you were located at the time you heard the said fire-alarm to the place where the said bark was anchored on said night.

Direct Interrogatory No. 9:

If you answer Interrogatory No. 6 in the affirmative, state just what you did after hearing the said fire-alarm.

Direct Interrogatory No. 10:

State whether or not you went aboard the said bark

on the evening of November 18, 1908, after hearing the said fire-alarm.

Direct Interrogatory No. 11:

If you answer Interrogatory No. 10 in the affirmative, state how you got aboard the bark, and the approximate time which elapsed from the time you heard the fire-alarm until you were aboard the said bark.

Direct Interrogatory No. 12:

If in answer to Interrogatory No. 10 you state that you went aboard the said bark, state just what evidence there was of a fire aboard when you arrived, and also state what efforts [51] were being made to extinguish the fire, the number of men engaged, and the means employed in said work.

Direct Interrogatory No. 13:

State, if you know, what portions of the ship were burned by said fire.

Direct Interrogatory No. 14:

State whether or not any outside assistance from other ships in Eagle Harbor was offered or used in extinguishing the said fire.

Direct Interrogatory No. 15:

If you answer the preceding interrogatory in the affirmative, state what other ships offered assistance, and the approximate number of men from the crews of said ships who assisted in putting out the fire.

Direct Interrogatory No. 16:

If you answer Interrogatory No. 14 in the affirmative, state where the other ships were anchored with reference to the position of the "Sardhana."

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant. [52]

[Cross-interrogatories to be Propounded to Fred N. Beal.]

[Title of Court and Cause.]

Cross-Interrogatories to be propounded to Fred N. Beal, at Walville, Wash., a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, against Thames and Mersey Marine Insurance Company, Ltd., on behalf of said respondent, in accordance with the stipulation hereto annexed:

Cross-Interrogatory No. 1: If in answer to direct interrogatory 13 you have stated that any part of the bark "Sardhana" was burned by said fire, please state when it was that you first saw such burned portions of said ship.

Cross-Interrogatory No. 2: If in answer to direct interrogatory 13 you have stated that any part of said bark "Sardhana" was burned by fire, please give your present judgment of the area so burned, that is, if you have answered that the bulkhead was burned, state the width of the burned area and the height, and also if you have answered that the ceiling and floor was burned, state your judgment of the extent thereof in square feet. [53]

Cross-Interrogatory No. 3: If in answer to direct interrogatory 13 you have stated that the bulkhead door was a part of said bark burned by said fire, please state if the entire door was burned, or, if

not, just how much was burned, and state in this connection whether the burning of the door was such as to destroy its use as such.

Cross-Interrogatory No. 4: If in answer to direct interrogatory 13 you have named some portion of the bark known by you personally to have been burned by said fire, please state whether or not you have received from any one connected with this case, or with this deposition, any word or statement apprising you of any matter or thing connected with or concerning the extent or area of the burning done by said fire, either to the floor, ceiling, bulkhead or bulkhead door of said bark.

Cross-Interrogatory No. 5: Have you at any time learned by word of mouth of any kind that the bulkhead door of the "Sardhana" is now in the city of Seattle? If so, please state all that you have so learned and, if the knowledge came to you through written communication, please attach same hereto as part of your deposition, or give your reason for an inability to do so.

Cross-Interrogatory No. 6: If in answer to direct interrogatory 10 you have stated that you saw smoke coming from the cabin, please state whether you went below at any time during the progress of the fire or whether you remained on deck.

Cross-Interrogatory No. 7: Is it true that there was a good deal of excitement on board the bark "Sardhana" at the time of the fire?

Cross-Interrogatory No. 8: If in answer to direct interrogatory 10 you have made statements with reference to the said fire, and the efforts made to extinguish the same, is it not a fact [54] that your observations of the matters testified to were obtained while you were on the deck of the "Sardhana," and not while you were below?

Cross-Interrogatory No. 9: If in answer to direct interrogatory 14 you have stated that outside assistance from other ships was offered or used, please state from your personal knowledge all that you saw done by such outside assistance in the actual extinguishment of said fire.

Cross-Interrogatory No. 10: If in answer to direct interrogatory 11 you have stated how you got aboard the bark, please state who accompanied you at that time.

BRADY & RUMMENS,
McCLANAHAN & DERBY,
Proctors for Respondent. [55]

[Title of Court and Cause.]

Answers of Witness Fred N. Beal, to Direct and Cross Interrogatories Hereto Attached.

Fred N. Beal, a witness for libelant in the above-entitled cause, being first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said cause, made answer to the said respective Direct Interrogatories and Cross-interrogatories, as follows:

Answering Direct Interrogatory No. 1, witness

says: My name is Fred N. Beal; age 35; a resident of Walville, Washington, and Storekeeper by occupation.

Answering Direct Interrogatory No. 2, witness says: I was Storekeeper at the plant of the Pacific Creosoting Company.

Answering Direct Interrogatory No. 3, witness says: In November, 1908, I had been in the employ of the Pacific Creosoting Company about two years, and I remained with them two years and one month after that date.

Answering Direct Interrogatory No. 4, witness says: I was at the residence of M. I. Helman, Chief Engineer.

Answering Direct Interrogatory No. 5, witness says: She was ready to discharge cargo, but had not started to do so, in Eagle Harbor, and was lying about one hundred yards off the wharf. [56]

Answering Direct Interrogatory No. 6, witness says: Yes.

Answering Direct Interrogatory No. 7, witness says: I was at the residence of M. I. Helman.

Answering Direct Interrogatory No. 8, witness says: On a direct line I was about four hundred yards from where the bark was anchored.

Answering Direct Interrogatory No. 9, witness says: I helped collect the fire-entinguishers from several places about the plant, placed them in a row-boat and proceeded to the vessel.

Answering Direct Interrogatory No. 10, witness says: Yes.

Answering Direct Interrogatory No. 11, witness

says: We climbed over the side of the bark. It was about ten or twelve minutes after I heard the fire-alarm until I reached the vessel.

Answering Direct Interrogatory No. 12, witness says: When I went aboard the boat there was a good deal of smoke, and several men with buckets were carrying water from the sides.

Answering Direct Interrogatory No. 13, witness says: The bulkhead between the cabin and after-hold was burned by the fire.

Answering Direct Interrogatory No. 14, witness says: Not to my knowledge.

Direct Interrogatories No. 15 and No. 16 witness is unable to answer. [57]

Answering Cross-interrogatory No. 1, witness says: Immediately after the fire was extinguished.

Answering Cross-interrogatory No. 2, witness says: Owing to the amount of smoke that was still in the vessel it is impossible for me to say as to the area burned.

Answering Cross-interrogatory No. 3, witness says: I don't know the extent of damage.

Answering Cross-interrogatory No. 4, witness says: I have never had any communication with anyone connected with this case regarding said fire.

Answering Cross-interrogatory No. 5, witness says: No.

Answering Cross-interrogatory No. 6, witness says: I went below.

Answering Cross-interrogatory No. 7, witness says: There was naturally considerable excitement on board.

Answering Cross-interrogatory No. 8, witness says: No.

Answering Cross-interrogatory No. 10, witness says: There were several other employees of the Pacific Creosoting Company with me when I went aboard, but cannot remember who they were.

FRED N. BEAL.

Subscribed and sworn to before me this 10th day of March, 1913.

CLAUDE L. CAVERLEY,
Notary Public in and for the State of Washington,
Residing at Walville. [58]

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Mar. 17, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [60]

[Deposition of F. D. Beal.]

[Title of Court and Cause.]

BE IT REMEMBERED that at this time, to wit, February 22, 1913, pursuant to the stipulation hereunto attached and made a part hereof, the interested parties to the foregoing case met at room 903 Yeon Building, in Portland, Oregon, the libelant was represented by L. Bogle, Esq., proctor, and the respondent was represented by E. B. McClanahan, Esq., proctor. The witness, Mr. F. D. BEAL, being present, was sworn by me to tell the truth, the whole truth and nothing but the truth, thereupon was examined and testified as follows:

(Deposition of F. D. Beal.)

Direct Interrogatories by Mr. BOGLE.

Q. State your name, residence and occupation.

A. F. D. Beal; residence, Portland, Oregon; occupation, manager of the St. Helens Creosoting Company.

Q. How long have you been the manager of that company? A. One year. [61]

Q. What was your business prior to that time?

A. For one year prior to that I was consulting engineer, and prior to that I was superintendent for the Pacific Creosoting Company for a little over four years.

Q. How long have you been in the creosoting business? A. For 24 years.

Q. Were you in the employ of the Pacific Creosoting Company in November, 1908? A. I was.

Q. Do you remember the British bark "Sardhana," being anchored in Eagle Harbor, Washington, in November, 1908? A. I do.

Q. The plant of the Pacific Creosoting Company is located at Eagle Harbor? A. It is.

Q. The said bark was engaged at that time in unloading creosote in drums? A. Yes.

Q. Do you remember the incident of the fire aboard that bark on or about November 18, 1908?

A. Yes.

Q. What directed your attention to that fire?

A. The sounding of the alarm of fire aboard the "Sardhana."

Q. Where were you at the time you heard this alarm?

(Deposition of F. D. Beal.)

A. I was in the house of Chief Engineer M. S. Hellman.

Q. What did you do on hearing this alarm sounding?

A. I immediately went to the works, secured fire-extinguishers and placed them in a boat and went aboard the vessel with the fire-extinguishers. [62]

Q. About what length of time elapsed from the time you heard the fire-alarm until you were aboard the British bark "Sardhana" while you were engaged in getting the fire-extinguishers and going aboard? A. Ten to 20 minutes.

Q. Did you see any evidence of fire aboard the "Sardhana" when you arrived aboard? A. I did.

Q. State what you saw in the way of evidence of fire.

A. On first going aboard I was told the fire was aft underneath the cabin deck. I went right back into the place indicated and saw the cabin was full of smoke which was coming out of the little hatchway of the dining-room of the cabin which had been opened, the smoke was coming from the lazaret or storeroom below.

Q. Did you have any fire-extinguishers with you?

A. I did.

Q. How many men went aboard with you?

A. From six to ten. Mr. Douglas and Fred Beal and myself collected the men around the plant and gathered up the fire-extinguishers.

Q. Do you remember how many fire-extinguishers you had with you?

(Deposition of F. D. Beal.)

A. We must have had eight to ten. We grabbed everything in sight. We had them distributed around the plant and we took every one in sight.

Q. What were the crew of the "Sardhana" doing when you got aboard?

A. They were carrying water down in there, passing it down [63] from hand to hand.

Q. About how many men were engaged in that work?

A. I should judge we had eight to ten men and he had all his own crew; they were strung out from the cabin out to the rail dipping the water over the side and passing it in in buckets.

Q. You immediately went below to the scene of the fire? A. I did.

Q. Just what evidences were there of a fire at the time you got below?

A. The fire was still burning on this bulkhead. It had been partly extinguished but there was some fire there still.

Q. Were the fire-extinguishers used in extinguishing the fire? A. They were.

Q. About how long after your arrival did it take to put the fire out?

A. At the time it was entirely out I should judge it was about 30 minutes from the time I arrived on board.

Q. How many men were below in the immediate vicinity of the fire engaged in trying to extinguish it?

A. I should judge about four men.

Q. What were they doing when you arrived?

(Deposition of F. D. Beal.)

A. Some of them were pouring water on and others were pulling out the dunnage, clearing it out of the way to get the fire extinguished.

Q. After your arrival did you assist in putting out the fire? A. I did.

Q. Were any of the other men from the creosoting company [64] below with you assisting in putting out the fire? A. Yes.

Q. You and other men from the creosoting company were using fire-extinguishers, were you?

A. Yes.

Q. After your arrival did the crew of the "Sardhana" use any more water in trying to put out the fire?

A. My recollection is that they did not. They may have passed down a few buckets but I believe we completed putting out the fire with the extinguishers.

Q. Approximately how many buckets of water were used in putting out that fire before the fire-extinguishers were used, if you know?

A. I don't know.

Q. State if you know how many buckets of water were used after you got there.

A. Approximately from six to ten.

Q. After your arrival?

A. Yes, the use of the buckets was discontinued after we arrived with the extinguishers.

Q. Mr. Beal, was there any other outside assistance offered and used in extinguishing this fire outside of the employees of the creosoting company?

A. Yes, some of the crew of the steamer

(Deposition of F. D. Beal.)

"Hornelen" came aboard and were assisting.

Q. Did any of the crew of the "Jupiter" come aboard to your knowledge?

A. No, I could not say to my knowledge that they did or did not. They might have been there; I don't remember. **[65]**

Q. Did you on that night see the extent of the fire and the amount of damage, that is, the portions burned of the door and the bulkhead?

A. As to seeing the extent of the damage that night, I did not on account of it being dark and congested down there.

Q. Did you afterwards make an examination of the portions burned? A. Yes.

Q. State what portions of the ship were burned.

A. The portion that was burned was that bulkhead.

Q. Was the door in the bulkhead burned to any extent?

A. The grating door was burned to a slight extent.

Q. To what extent was the bulkhead below outside of the portion of the door that was burned?

A. I don't know that I could say positively now; it has been so long ago, just to what extent the bulkhead was burned. It was burned quite a little bit and was spread out from the door; just to what extent along there I am unable to say at the present time.

Q. Do you know or remember now whether or not any of the dunnage was burned or scorched?

A. Yes, it was.

(Deposition of F. D. Beal.)

Q. Do you remember whether any portion of the ceiling was burned or smoked, and blistered?

A. It was smoked and blistered, but I can't say now if the ceiling was burned.

Q. Do you remember any portion of the ceiling was scorched?

A. I cannot remember how much of the ceiling was burned.

Q. That is, you don't remember if it was actually on fire? [66] A. No.

Q. Did you see it was damaged to any extent?

A. No, I should say the ceiling was not damaged to any extent.

Q. Beyond being blistered?

A. Beyond being blistered and smoked up.

Q. Mr. Beal, do you know at what point, or do you know the fire point or temperature at which creosote is inflammable?

A. That depends; anywhere from 700 to 900 degrees Fahrenheit, depending on the creosote.

Q. Was this bulkhead which you have testified was burned to some extent a permanent part of the ship?

A. It was.

Q. The door which you said was burned was built in the bulkhead? A. Yes.

Q. Did the fire-extinguishers assist to any great extent in putting out this fire? A. They did.

Q. In your opinion, Mr. Beal, would the fire have been a larger fire and done greater damage if the fire-extinguishers had not been furnished and they had depended absolutely on the use of water in put-

(Deposition of F. D. Beal.)

ting out the fire?

Objected to by counsel for respondent as immaterial.

A. Yes, I think the probabilities are the fire would have been of much greater extent had the fire-extinguishers not been used. [67]

Q. Do you remember the incident of a lighter loaded with creosote in drums capsizing in the harbor? A. I do.

Q. Do you remember at this time approximately the number of drums on that lighter or scow?

A. No, I don't. I should judge from my recollection that there were from 150 to 200 drums. My recollection is it was only partially loaded.

Q. Do you remember the condition of the weather upon the night this scow capsized?

A. Yes, my recollection is it was a clear night.

Q. I mean as to the weather on the night the scow capsized. A. It was not raining.

Q. I refer to the state of the wind.

A. Practically no wind that night.

Q Is your recollection of that very clear?

A. Yes.

Q. I will hand you this paper and ask you if that is your affidavit. A. Yes.

Q. I will ask you to examine that paper and say if that will refresh your recollection of the incident.

A. Oh, you refer to the weather the night the scow capsized?

Q. Yes.

A. Yes, there was a gale that night. I thought

(Deposition of F. D. Beal.)

you referred to the night of the fire.

Q. No, the night the scow capsized.

A. There was a gale that night. [68]

Q. The statement which I have handed to you was made by you at about what date?

A. About December 2d, 1908.

Q. That was very shortly after the incident of the scow capsizing?

A. Yes, a week or ten days. The scow capsized on November 21st and this was on December 2d.

Q. Your recollection of the facts would be much clearer at that time than at the present date?

A. Yes.

Q. Did you make any examination of the scow subsequent to the time she was capsized?

A. Not a critical examination, other than it was customary in getting scows for that work to look them over as to condition to see whether they were suitable for the purpose.

Q. Do you remember at this time whether any repairs were made to that scow?

A. I have no recollection of any repairs having been made to the scow.

Q. Who was the owner of the scow, or did it belong to your own company? A. No.

Q. Did it belong to the stevedores?

A. No, it belonged to one of those small companies in Seattle; it was not Drummond's; it was one of the small independent companies out there. I did know the name of the company at that time but have forgotten it now.

(Deposition of F. D. Beal.)

Q. Do you remember how this scow was moored to the "Sardhana"?

A. It was tied with lines alongside the vessel. [69]

Q. Was the side of the scow flush up to the side of the vessel? A. Yes, right alongside the vessel.

Q. Do you remember the direction of the wind on that night?

A. My recollection is it was a southeast wind.

Q. Do you know of your own knowledge what caused the scow to capsize?

A. Yes, I know what caused it to capsize. The real cause of the scow capsizing, it got water in it and the water ran to one side of the scow, putting it on an uneven keel and the weight carried it over.

Q. Did she have water in her the night she capsized before sending her out?

A. No, we examined those scows every night, and sounded them for water to see that they were on an even keel.

Q. Did you sound her on this night?

A. Yes, we did every night.

Q. Was there any water in her then?

A. Practically none to speak of. There is always more or less water in the bottom of these scows but there was no water that we would consider as a dangerous proposition to the scow if she had remained as she was.

Q. How did the water have anything to do with her sinking?

(Deposition of F. D. Beal.)

A. Additional water got into the scow during the night.

Q. How did that water get in?

A. Supposedly on account of the storm.

Mr. McCLANAHAN.—I don't care for suppositions.

A. Well, this has to be more of a supposition than anything else because I could not swear to that, that water got into [70] her on account of the wind, possibly because of the rolling of the scow but of course that is my supposition.

Proctor for respondent moves to strike out the supposition of the witness.

Q. As a matter of fact, your entire statement as to water having gotten into her at all is a supposition?

A. That is true.

Mr. BOGLE.—I ask that all that testimony be stricken out.

A. We judged that from the condition of the scow and the amount of water that was in her.

Q. You have no personal knowledge of whether or not that was what caused her to sink?

A. No, not personal knowledge.

Q. Was not the scow afterwards examined and surveyed by Mr. Frank Walker, marine surveyor?

A. I would not say positively. My recollection is it was. Whether he came there and made the examination of that scow I would not say positively at this time.

Q. I hand you a paper with a letter I on it, being respondent's one in this case, and ask you what that is.

(Deposition of F. D. Beal.)

A. That is a statement covering the cargo of the "Sardhana."

Q. Is that your signature? A. It is.

Q. I wish you would explain if you now remember how that statement was compiled.

A. These figures were taken from an examination and inspection of the drums at the time of being discharged from the "Sardhana," immediately on completion of the cargo, or soon thereafter.

Q. Does that statement correctly show the number of drums [71] discharged in good condition and the number of drums damaged, and the number of drums which were empty? A. It does.

Q. I hand you this paper, being Respondent's Exhibit Two, and ask you if you have any knowledge of that exhibit.

A. I can't say that I have of that particular paper. These figures were evidently—they correspond with those figures, it is evidently a copy taken from that. I remember we gave Mr. Walker a statement, and from my recollection I should judge that is their copy of the original we gave him. I won't say positively that was the statement I handed him.

Q. Statement of what?

A. Statement of the damaged *froms* on the "Sardhana."

Q. The statement, Respondent's Exhibit Two, refers to gallons and not drums? A. Yes.

Q. Is that a statement of the contents of the damaged drums?

A. So far as the number of drums concerned, yes.

(Deposition of F. D. Beal.)

As to the number of gallons I could not say from the data I have at the present time that that is.

Q. Where would that information be secured—in other words, where would the measurement of the number of gallons be made?

A. They would be made at the Pacific Creosoting Company plant, at Eagle Harbor.

Q. You were the superintendent of that plant at that time, were you? A. I was.

Q. Would these measurements be made under your direction? [72] A. Yes.

Q. Do you remember whether Mr. Frank Walker made a survey of the damaged cargo, drums and creosote lost ex the "Sardhana"?

A. He made a survey of the condition of the drums. The statement that he made in regard to the number of gallons I think was taken from our records. I don't think he personally measured the oil that came out of these particular drums.

Q. What is the usual method of measuring the oil in damaged drums to ascertain the amount in the drums and to get at the amount which was missing?

A. The oil was measured in square tanks into which these particular drums were dumped.

Q. Do you know whether or not that was done in this instant? A. It was.

Q. That would be the only way you could ascertain the number of gallons that were missing from those drums? A. Yes.

Q. At this time you don't remember the exact figures, do you?

(Deposition of F. D. Beal.)

A. No. There is one item there of 171 drums, amounting to about 8,458 gallons that I can locate in my records covering that. The other two drums were separated out from other figures in some way.

Q. Do you swear positively that the first item on Respondent's Exhibit Two was correct and corresponds with your figures?

A. Yes, that it corresponds with my original figures as made.

Q. Is there any other source from which other items could be obtained, except from your figures?

A. Yes, that should be obtained from copies and from records [73] and reports in the Pacific Creosoting Company's office.

Q. They were compiled from your figures?

A. Yes.

Q. The only way that could be obtained was from that original measurement made under your direction? A. Yes.

Q. You furnished Mr. Walker with copies of your reports, didn't you?

A. Yes, I believe this is a copy of the record we furnished him.

Q. You are now referring to Respondent's Exhibit Two?

A. Yes, that is my recollection that this is a copy of the report given him, and is compiled or was compiled from our record and figures.

Q. Do you know how many gallons of creosote were taken out of the hold of the "Sardhana," that is, loose gallons?

(Deposition of F. D. Beal.)

A. From my records I am able to locate a little over 4,000 gallons, about 4,200; whether there are more that came from the "Sardhana," I can't just now state. There are some other notations there, but it is not stated specifically.

Q. Can you find a record of any more than 4,200 gallons having been taken out of the hold?

A. All that I have an exact record of is the 4,200 gallons.

Q. The book to which you are referring, is that your original record made by you, or by someone of your clerks under your direction?

A. It was made by my inspector under my supervision.

Q. Were the entries made by you? [74]

A. No, the entries were made by my inspector.

Q. Who was your inspector at that time?

A. A. O. Powell, Jr.

Q. Have you any independent recollection at this time of the approximate number of gallons of creosote lost in this shipment? A. No, I have not.

Cross-examination by Mr. McCLANAHAN.

Q. Was any meter used in the measurement of the creosote from the damaged drums? A. No.

Q. It was simply dumped or poured from the drums into a receptacle known to contain so many gallons and measured in that way? A. Yes.

Q. And this statement contained on Respondent's Exhibit Two is the statement of the creosote so dumped from the partially damaged or partially emptied drums and measured in this receptacle?

(Deposition of F. D. Beal.)

A. Yes.

Q. Referring to Respondent's Exhibit One, what did you mean by this expression therein: "As to the quantity of oil received in this cargo we can't even hazard a guess as it is practically impossible to give anything within reach of what she brought."

A. That would be as to the contents of the drums, and that was before the time the drums were dumped and therefore it would have been impossible at the time of making that statement to make a statement other than as to the condition of the drums before being dumped. We had no knowledge of the amount of oil contained [75] in the drums until after dumping them and measuring the contents in this tank after they were dumped.

Q. When were these damaged drums dumped?

A. Approximately some time between the latter part of December and along up to the first of March. This statement was made on March 8th. We have records of dumping there on the "Sardhana" from December 1st—prior to December 1st. I have a record of 24,572 along the latter part of November and up until March.

Q. What date in March?

A. I should judge from this up to the first of March.

Q. From the latter part of November up to the first of March?

A. Here is 197 from the "Sardhana" on March 5th. It extended along into March. That is the last I have any record of here, March 5th. That is

(Deposition of F. D. Beal.)

the only thing I have to show the dumping of the damaged drums and March 5th is the last.

Q. You have a record, then, of the measuring of the creosote in the damaged drums extending from the latter part of November to the 5th of March?

A. No, I have notations of the dumping from the damaged drums from the latter part of November to March.

Q. Does this notation or the notations you have enable you to testify that during that period at different intervals the drums were dumped and measured?

A. Not as they stand now. The only thing I have to go by is this statement on the number of drums here corresponding with this, this being made March 8th. I would testify these drums were dumped prior to March 8th or we would not have been able to make up that statement. [76]

Q. You are referring to Respondent's Exhibit One?

A. Yes. This corresponds to Respondent's Exhibit Two and this was made March 8th.

Q. I don't quite follow you. You mean you have nothing to enable you to testify when these drums were measured other than Respondent's Exhibit Two?

A. That is all I could possibly swear to.

Q. You would not want to say that the drums were measured out much before March 8, 1909?

A. No, not positively, I could not state that.

Q. Where were these drums during all this period,

from the date of their discharge up to March 8, 1909?

A. They were on the ground near our dumping plant at Eagle Harbor in the yards.

Q. Do you know why they were not measured sooner than that?

A. My recollection was that our storage capacity in the tanks was pretty well taken and we only dumped the drums as we had room in the tanks for them.

Q. That refers to full drums; did you dump them at any time and measure them?

A. Yes, the drums received were dumped and measured.

Q. Do you remember when you measured the full drums?

A. My notations here on the figures extend from that time over into May, 1908—May 13th, 1909, is the last one I have.

Q. Have you any means of ascertaining the amount of creosote from the full drums received by you off the "Sardhana"?

A. No. Those records would be with the Pacific Creosoting Company. I have none here. [77]

Q. Were those full drums measured in the same way that the creosote in the partially damaged drums were measured? A. Yes.

Q. No meter was used? A. No.

Q. Have you a meter there for the purpose of measuring creosote?

A. We did not at the time I was there.

Q. You were there and would know if they had

(Deposition of F. D. Beal.)

one? A. I would have known it.

Q. Did you have any knowledge at the time of the time that the lighter capsized?

A. No, not of my own personal knowledge. I knew it capsized some time between six o'clock at night and six o'clock in the morning is all.

Q. You say that the wind blowing that night was a southeast gale? A. That is my recollection.

Q. Do you remember your little jetty or wharf running out into the harbor—was it a dock?

A. Yes, I remember that.

Q. That would be struck on the right-hand side facing north by this southeast gale? A. Yes.

Q. When did you retire that night, do you remember the hour approximately?

A. No, I remember it was Saturday night, I think it was.

Q. How do you remember there was a wind blowing that night?

A. I remember it wakened me up during the night.

[78]

Q. Did you get up?

A. No, I don't think I did.

Q. Did you look at the time? A. No.

Q. I presume, Mr. Beal, that your statement with reference to the barge capsizing through filling with water was made because that would be the only means that would capsize the barge?

Objected to by counsel for libelant because there is no testimony in this case to that effect and nothing to show such a fact.

(Deposition of F. D. Beal.)

A. That would be my judgment, that would be the only thing that could capsize the barge—her filling with water.

Q. On the night of the fire there was a good deal of excitement, was there not? A. Yes.

Q. Caused by the inflammability of the cargo of the "Sardhana"? A. Yes.

Q. How large was the lazaret that you entered through the hold in the cabin floor?

A. It was approximately the width of the vessel in the stern, and I should judge in length approximately 15 or 20 feet.

Q. Just room there to get down there.

A. Just down the ladder there.

Q. Did you go down a ladder or stairs?

A. Down a ladder.

Q. Were these stores piled between the ladder and the bulkhead where the fire was? [79]

A. Not at the time I went down. They possibly had been piled there but had been cleared away to make room to get to the fire.

Q. Were indications such as to denote that they had been cleared away? A. Yes.

Q. So you had a free passage?

A. So they could carry and pass the water down; they were using buckets of water.

Q. If these buckets were filled by means of a pump operated on the ship did you see how they handled the buckets after they were filled—were they passed from man to man?

A. Passed from man to man and down through

(Deposition of F. D. Beal.)

this little hatchway.

Q. From man to man? A. Yes.

Q. How long a distance was it from the fore part of the ship to this cabin manhole that you entered to go into the lazaret?

A. You mean from the bow of the ship?

Q. Yes, to the peak.

A. Yes—I judge it was all of three-fourths of the distance from the fire, of the entire length of the ship.

Q. Can you approximately state what that distance was? I don't remember the distance of the length of the ship.

A. I should approximate 125 to 150 feet. That would be only an approximation.

Q. If that pumping was done from the fore part of the ship, then those buckets were passed from man to man to this hatchway?

A. I don't recollect any pumping being done.

[80]

Q. I say if it was done.

A. If it was done; yes.

Q. That was rather a slow process, was it not?

A. That is my recollection, that the water was dipped over the sides with buckets and the men were strung along from the cabin down to the hatch.

Q. We had a witness on the stand yesterday who said there was pumping done.

A. It might possibly have been, I won't say there was no pumping. I don't recollect it.

(Deposition of F. D. Beal.)

Mr. BOGLE.—I don't think he said they were pumping.

Mr. McCLANAHAN.—His testimony would show. He said it was pumped from the fore part of the ship.

Q. You said you saw evidence of some of the dunnage having been effected by the fire? A. Yes.

Q. That was loose dunnage which was lying on the 'tween-decks?

A. No, it was dunnage that was sticking out from underneath the drums, that the drums were piled on, and also there were some loose down in there, that had dropped down in there evidently.

Q. Did you examine that dunnage to see if it was saturated with creosote or not?

A. It would not be saturated. Some of the surface of it might have had some on it, but it was not saturated.

Q. Now, Mr. Beal, a number of witnesses have testified to having inspected that fire. The bulkhead door of the [81] "Sardhana" has been brought from England and was also seen by these witnesses that I refer to. I think there were five who testified that the bulkhead door was all that was burned.

Mr. BOGLE.—I object to the form of the question.

Mr. McCLANAHAN.—I have not finished.

Mr. BOGLE.—I don't think there were five witnesses.

Mr. McCLANAHAN.—I don't think it is fair to object in the middle of the question. You know very well in this proceeding I am going to finish my question.

(Deposition of F. D. Beal.)

Mr. BOGLE.—I want my objection to go to the form of the question as far as you have proceeded.

Question read as follows: "Now, Mr. Beal, a number of witnesses have testified to having inspected that fire. The bulkhead door of the 'Sardhana' has been brought from England and was also seen by these witnesses that I refer to. I think there were five who testified that the bulkhead door was all that was burned."

Q. (Continued.) Some times our memory is effected by the judgment and memory of others. I am simply making this statement of giving you some idea of the memory of others and to see how distinctly your memory of that fire was. Are you perfectly clear, in the light of my statements, and if that refreshes your memory any, and if it is refreshed, that there was any appreciable burning of the woodwork outside of the door itself—the door was six feet wide, as you remember it, and was a sliding door with slats in the top, if you remember that?

A. I remember that the door was a kind of a slatted grate door but as to whether it was a sliding door or not, I don't remember. [82] My impression now, since you spoke of it, I think it was a sliding door. According to my recollction the fire extended beyond the door and through a portion of the bulkhead. A lot of these things come back to me now since you have brought them up. From my recollection I would state the bulkhead was burned as well as the door, but to what extent in measurement besides that I would be unable to state.

(Deposition of F. D. Beal.)

Q. Do you remember, Mr. Beal, that the whole bulkhead was slatted in the same way the door was slatted?

A. My impression from recollection was it was. I don't know either positively as to that, all the way across the ship.

Q. If that is your impression isn't it quite likely you may be confused as to the extent of the fire beyond the door, the door and the bulkhead being somewhat of the same subscription?

A. No, I don't think so. I am quite clear in my recollection that some of these slats were burned as well as the slats on the door, especially to the right of the door facing the stern of the ship, that is the forward side of the bulkhead facing the side of the ship toward the door, and some of the slats were burned outside of the door.

Q. Were there any indications of separate seats of the fire? If I do not make myself clear tell me and I will try to do so. A. No.

Q. The fire seemed to have been located in one place and from that spread?

A. From what I saw of it I considered the fire started in one place. It was narrowing down from that bulkhead going along here, as I recollect it, the door coming in here somewhere. [83]

Q. Will you please draw a sketch of the way you remember it and we will introduce that sketch in evidence.

The witness makes a sketch which he uses with his answer.

(Deposition of F. D. Beal.)

A. The door was nearer one side of the ship than it was to the other. From what I recollect the seat of the fire seemed to be along in this position somewhere. The fire seemed to crawl up here and to spread both ways from the seat of the fire, extending across the door in this way and extending somewhat to the right of the door from this point as it came up. The portion on my sketch marked X is the location of the door (X door). A, B, C and D would represent the 'tween-deck. F would represent the slatted bulkhead.

Q. Will you on that place the position of the seat of the fire as you remember it and your recollection of how it spread.

A. The X in a circle represents the seat of the fire, as near as I can recollect it.

Q. Will you please place from the X in a circle something to indicate your best recollection of how the fire spread? Make it with dotted lines.

A. I don't recollect how it went up. This is my recollection as near as I can place it now. It spread from the seat and seemed to widen out as it came up.

Q. You have no recollection of how high it went?

A. On the door itself—my remembrance of it is that the door itself as well as some of this along in here was burned.

Q. You mean the door itself was, from your recollection, [84] burned up to this point?

A. That will show within ten to twelve inches of the top.

Q. Don't you remember, Mr. Beal, that the door

(Deposition of F. D. Beal.)
was of the same construction of the bulkhead?

A. Yes.

Q. So that on your diagram here when you left out the slat construction seemingly that was done simply to indicate in the diagram the place where the door was located? A. Yes.

Q. I will ask you to sign your name to that and the same will be introduced in evidence.

The same sketch was signed by the witness and offered in evidence and marked "Beal's Exhibit One, J. K. S. Feb. 22, 1913. F. D. Beal," and the same is returned herewith, and made a part hereof.

Q. Did you actually see any water thrown on the fire? A. Yes.

Q. Then they had gone from the lazaret on to the 'tween-decks and were fighting the fire from that side.

A. No, this lazaret, you might say, was in the 'tween-decks; it was a continuation of the 'tween-decks back in the cabin floor.

Q. Had they passed through the door?

A. Yes, they had to pass through the door; they came down to the little hatchway, and passed through here, through the door to the front of the bulkhead itself, through the door.

Q. And next beyond the bulkhead the drums were stored? A. Yes.

Q. And there is a little alley-way between the bulkhead and the drums?

A. Yes, a small space, just space enough so that a man could [85] barely crowd along here between

(Deposition of F. D. Beal.)

the bulkhead and next to the drums.

Q. And they had freed that place of the fire before you got there? A. Yes.

Q. Do you remember who was in that little space fighting the fire when you got there with your extinguishers? A. The captain was there.

Q. Was he not in charge of the operations?

A. Yes, he was directing the operations.

Q. Did he give way to you when you came in, Mr. Beal, or did the water still continue to flow?

A. My recollection is that as soon as we got down there with the extinguishers we put out the fire with the extinguishers and the use of the water was discontinued.

Q. What made that fire spread, in your opinion? It required a number of buckets of water and fire-extinguishers to extinguish it; was it because of the creosote?

A. Well, to a certain extent, yes. The smoke was very dense down in there and coming off the creosote it was hard to get right at the seat of the fire there on account of the smoke and the limited amount of space they had for working in there. It was a kind of a smoldering fire and on account of the thick smoke it was kind of a hard proposition to locate very quickly the exact seat of the fire. It was a question of kind of working to it as you went along.

Q. It was dark smoke, was it not?

A. It was pitch dark down in there and smoky.

[86]

Q. What was your purpose in visiting the seat of

(Deposition of F. D. Beal.)

the fire after extinguishing it—I understand you visited it two or three days afterwards? A. Yes.

Q. What was the object of doing that?

A. As far as I was personally concerned, it was more out of curiosity than anything else, to see the exact location, and how it looked in there in daylight. More or less curious as to how a fire could get started down in a place of that kind. I think that was it more than anything else that prompted me to go down there and examine it.

Q. Did you have anything to do with furnishing the facts as to the extent of this fire to your company?

A. Nothing further than what is embodied in my statement as sworn to here before the notary public.

Q. What statement is that, please? Please produce it.

A paper is handed the witness by his counsel, Mr. Bogle.

A. That is the only recollection I have of furnishing any statement, that statement there is the only one I can recall, outside of various conversations, but as to just what they were I could not say now.

Q. In this case, the respondent has asked a number of interrogatories of the libelant; the libelant says the bulkhead was burned, together with other parts of the ship, and the respondent asked the libelant what other parts of the ship were burned, and the libelant said the floor and ceiling. Did you furnish them with any such information as that?

(Deposition of F. D. Beal.)

A. I have no recollection of furnishing that information. [87]

Q. We asked them if any repairs were made to the ship and they said, yes, the bulkhead was replaced by a new one; did you furnish that information?

A. No, I don't remember of furnishing that information.

Q. We asked them how much of the bulkhead was burned and they said about two-thirds of it; did you furnish that information?

A. I have no recollection of doing so.

Q. You have no recollection?

Mr. BOGLE.—The witness has testified that all the information he furnished is contained in a statement which he has produced and we are willing to offer the statement in evidence.

Q. Did you furnish the Creosoting Company with any facts with reference to the capsizing of the lighter, Mr. Beal?

A. Yes, my recollection is that I did.

Q. What were those facts?

A. They are embodied in that statement I referred to a moment ago.

Q. Have you another statement?

A. This one. (Witness exhibits the statement to counsel.)

Redirect Examination by Mr. BOGLE.

Q. What is the construction of this creosoting tank—how is it constructed so that you can measure creosote if there is no meter?

A. It was a square tank of which we knew the

(Deposition of F. D. Beal.)

dimensions and the cubical contents were figured out so we could measure the creosote gallons by the depth of oil in the tank. [88]

Q. How could you tell, Mr. Beal, from the height of oil in this tank the depth it was in the tank?

A. We usually, or in fact always, measured it by taking a stick and measuring the distance down from the top.

Q. How did you make the measurements?

A. Ordinarily by placing down a stick at the side of the tank from this given point into the oil and measuring the distance from this given point to the surface of the oil.

Q. And in that way you could calculate the number of gallons of oil in the tank?

A. Yes, to the dot.

Q. You testified there was no meter on this tank; you meant no regular constructed mechanical device which would tell you the number of gallons by placing it in the oil or pouring the oil through it?

A. That is what I meant.

Q. The tank was so constructed that you could calculate the number of gallons just as accurately by your method? A. Yes.

Q. That is what you meant when you said there was no meter?

A. Yes. My inception of a meter is a mechanical device used to pour the oil through and which registers the amount of oil which goes through it.

Q. You had no such device as that?

A. No, we had none.

(Deposition of F. D. Beal.)

Q. Do your records there show the dates this creosote from the damaged drums were dumped and measured? A. No. [89]

Q. You testified they were dumped somewhere from the latter part of November to the 8th of March; do you know upon what dates during that period they were dumped?

A. No, I could not tell from this record. These notations just show that they were dumped between those dates.

Q. Where were these damaged drums stored from the time they were taken off the ship until they were dumped in the tank and measured?

A. In the yards near the dumping tank of the creosoting plant.

Q. Were these drums examined by yourself or under your direction to see whether they were leaking or not?

A. They were examined by me personally.

Q. How were they placed then?

A. They were laying down on small bearing cases we had on the ground for rolling them on.

Q. Do you know whether any appreciable amount of creosote leaked from these drums from the time they were taken from the ship until dumped into the tank?

A. No, the drums that we left in the yard that were taken from the ship were not leaking; those that were we dumped at once. The ones that were left there were sound and not leaking.

Q. You testified in answer to one of counsel's

(Deposition of F. D. Beal.)

questions, or rather he asked you if there was any way for this scow to capsize if she had no water in her. I believe you answered that was your opinion that that was the only way she could capsize.

A. This is my judgment. [90]

Q. Mr. Beal, if this cargo of creosote drums had shifted to one side of the barge wouldn't that make the barge capsize?

A. That is true if they shifted to one side.

Q. If the barge collided during this gale with the "Sardhana," causing the drums to all shift to one side of the barge, would not that probably cause the barge to capsize?

A. Yes, if it were possible for the drums to shift to one side of the scow, that is true.

Q. If water got into the hold of this barge and she listed to one side the drums would shift before she capsized, wouldn't they?

A. In my judgment, no. I don't think it was possible for the drums to shift on the scow until the scow was in the attitude of capsizing, then they would shift and go over with her.

Q. In the attitude of capsizing, you mean with a heavy list, don't you?

A. Yes, when she commenced to capsize she would go all at once.

Q. How were these drums loaded?

A. They were laid down in the scow and well loaded.

Q. Were they loaded in tiers? A. Yes.

Q. Were the upper tiers fastened in any way?

(Deposition of F. D. Beal.)

A. It is my recollection that there was only one tier, the lower tier, on the scow at the time.

Q. If the testimony of the stevedores with reference to the loading of this scow was that there were two tiers of drums, with one above the other, would it not be possible for this upper tier to shift in heavy weather? A. Not in my judgment. **[91]**

Q. What would prevent the upper tier from shifting if the barge collided with a scow or something else during the night during a heavy swell?

A. The bands on the drums would prevent them from sliding. The whole thing would have to move at once.

Q. If she bumped very severely and took a severe list would the drums shift?

A. No, I don't think that possible; I don't think it possible for these drums to shift only on the capsizing of the scow.

Q. Only on the capsizing of the scow?

A. No, I don't think it possible.

Q. What do you base your notion on—your opinion on—have you had any experience in loading, such as would enable you to give such an opinion on that subject?

A. Yes, I have had a great deal of experience in loading and handling scows.

Q. If this scow was afterwards surveyed by a competent surveyor and it was found she was perfectly tight and not leaking or making any water, how could you say she could possibly capsize?

Objected to by counsel for respondent unless it be

(Deposition of F. D. Beal.)

stated to the witness the character of the survey that was made.

Question read.

A. I don't believe it would be possible for that scow to capsize unless she did have water in her.

Q. Is it your opinion the water came from the top of the scow in order to get into the scow?

A. Yes, that is my opinion.

Q. With your dotted lines you have indicated on your Exhibit [92] One the lines or direction of the fire?

A. As near as my recollection goes it was something of that character.

Q. And then is it your testimony the fire extended on the right as indicated by the dotted line to the right of this exhibit across the bulkhead?

A. Yes, as far as my recollection goes now. I have no recollection of the fire extending to the left of the door, and my recollection is it did extend some little distance to the right of the bulkhead.

Q. Is that your recollection, the place I am indicating here?

A. No, just in there, where it is dotted.

Q. Here you don't recollect?

A. I have no recollection of that. The fire at the bottom was confined to one point. It was very smoky and very dark down there, and the smoke spread as it arose, and the fire also had a tendency to spread and did spread as I have indicated it there on my sketch.

Q. Mr. A. O. Powell, Jr., was your inspector?

(Deposition of F. D. Beal.)

A. Yes.

Q. Did you make these entries in this book from which you have been testifying? A. I did.

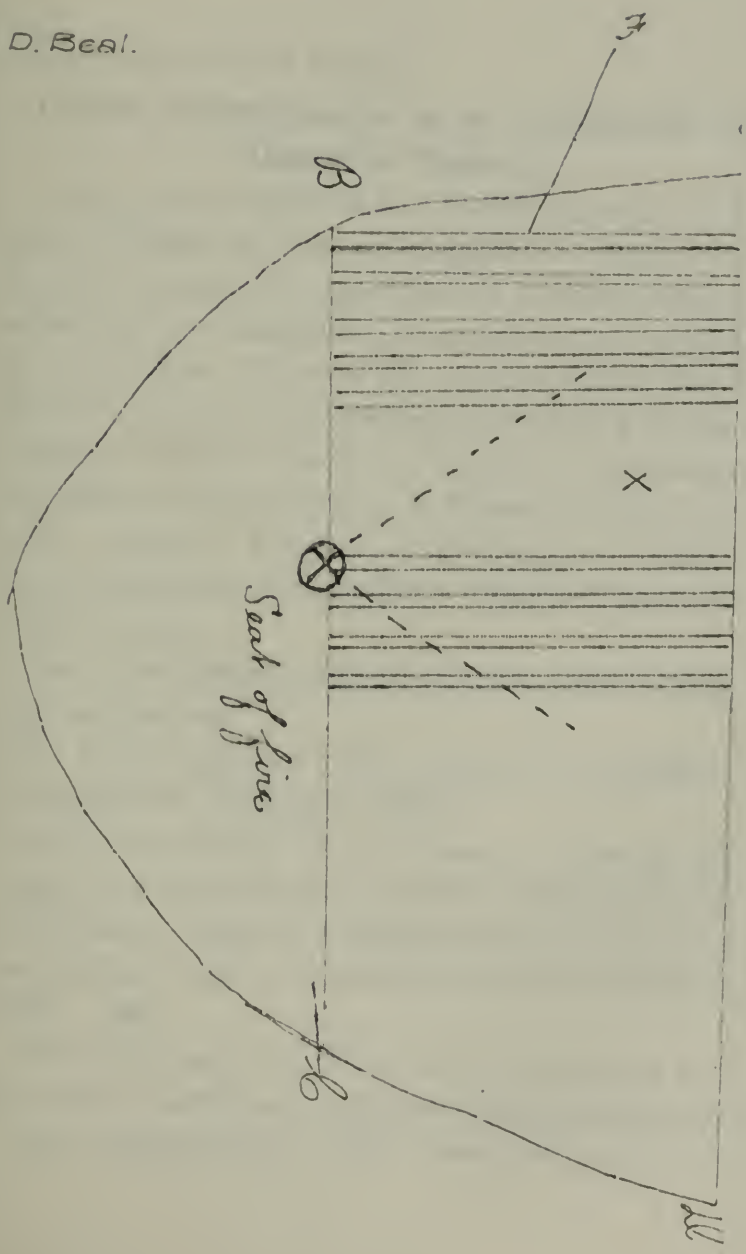
Excused.

IT WAS STIPULATED that the witness need not sign his deposition but that the certificate of the notary taking the deposition would be accepted by counsel the same as if the witness had signed the same.

JULIA KIRKER SAYRE, (Seal)
Notary Public. [93]

BEAL'S EXHIBIT ONE
J. K. S. Feb. 22, 1913.

F. D. Beal.



[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Mar. 17, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [95]

[Title of Court and Cause.]

[Direct Interrogatories to be Propounded to Alexander Wallace.]

Direct interrogatories to be propounded to Alexander Wallace at London, England, a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, against Thames & Mersey Marine Insurance Company, Limited, respondent, on behalf of said respondent in accordance with the commission hereto annexed.

1st Interrogatory: State your name, age, residence and occupation.

2d Interrogatory: What was your occupation in the month of November, 1908?

3d Interrogatory: If your answer to the 2d interrogatory is that you were master of the British bark "Sardhana," state how long you had been such master and how long you remained such after November, 1908. [96]

4th Interrogatory: When were you last on board the bark "Sardhana" and where was she at the time?

5th Interrogatory: Where was said bark on No-

vember 18th, 1908, and were you then on board of said bark?

6th Interrogatory: Did anything unusual happen on said bark on said day and, if so, what was it?

7th Interrogatory: If your answer to the 6th interrogatory is that there was a fire on board said bark on said day, state in detail the nature and extent of said fire, the parts of the ship damaged by it and the nature and amount of said damage.

8th Interrogatory: State in detail the means used and the length of time it took to extinguish said fire.

9th Interrogatory: In the work of actually extinguishing said fire was any outside assistance rendered?

10th Interrogatory: Was a survey held on account of said fire?

11th Interrogatory: Were any repairs made to your ship on account of said fire?

12th Interrogatory: Were any repairs made necessary thereby?

13th Interrogatory: If your answer to the 11th interrogatory is that no repairs were made on account of said fire, state, if you know, what would have been the approximate cost of such repairs, if they had been made.

14th Interrogatory: If you state in answer to the 7th interrogatory that the door of the wooden bulkhead separating the lazarette from the after 'tween-decks was damaged by said fire, state whether you can produce said door at the present time.

15th Interrogatory: If your answer to the 14th interrogatory is in the affirmative, please produce

said door and have the same marked as an exhibit of this your deposition.

16th Interrogatory: Is said door as produced by you in exactly the same condition as it was immediately after said fire? If not state what is the difference in condition. [97]

17th Interrogatory: Did you make an extended protest at any time after said fire?

18th Interrogatory: If your answer to the 17th interrogatory is in the affirmative, state when and where said protest was made, at whose request and under what circumstances and where the same now is.

19th Interrogatory: If said protest contains substantialy the following statement, and the same is not in accordance with your present testimony, explain, if you can, any inconsistencies between the two. The statement referred to is as follows: "After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after 'tween-decks, were burnt and some of the ship's stores in the lazarette were damaged by water and chemicals."

20th Interrogatory: The Pacific Creosoting Company, libelant in this case, has been asked certain questions in regard to the nature and extent of the fire on board the "Sardhana," to which you have testified, and in answering one of the interrogatories propounded to it said libelant says that the floors and ceiling of the "Sardhana" near the bulkhead were burnt by the said fire. Is that statement true or false?

21st Interrogatory: Further answering another interrogatory propounded to it with reference to said fire, said libelant says that two-thirds of the said bulkhead was burnt and charred by the said fire. Is that statement true or false?

22d Interrogatory: Further answering another interrogatory propounded to it with reference to said fire, said libelant says that the damage caused to the "Sardhana" by said fire was such as to require repairs, and that the repairs were made by the ship's [98] carpenter and consisted of removing the burnt bulkhead and building a new one in its place. Is that statement true or false?

23d Interrogatory: Further answering another interrogatory propounded to it with reference to the difficulties encountered in extinguishing said fire, libelant says: "That the difficulties encountered in extinguishing the fire were that stores were piled on one side of the bulkhead and drums of creosote, dunnage, etc., on the other, and that the lumber was saturated with creosote making the same very inflammable, and that it required hard work on the part of the crew of the 'Sardhana' and the persons so assisting them to extinguish the fire." Is this statement with reference to the difficulties encountered in extinguishing the said fire true or false?

24th Interrogatory: What cargo was the "Sardhana" carrying in November, 1908?

25th Interrogatory: Where was said cargo stowed on said vessel?

26th Interrogatory: Where was said cargo being carried to and to whom was it consigned?

27th Interrogatory: Was said cargo, or any part thereof, lost during the voyage to the port of Eagle Harbor and, if so, state the details of how such loss occurred and the amount of such loss.

28th Interrogatory: If in answer to the 27th interrogatory you say, *inter alia,* that there was a leakage of certain creosote in drums on board said bark, state in what part of the ship said leakage took place.

29th Interrogatory: What, if anything, was done with the creosote which had leaked out of the drums? Give full details.

30th Interrogatory: State if you can approximately how much of said creosote which so leaked out of the drums was lost.

31st Interrogatory: Did the Pacific Creosoting Company have [99] anything to do with the creosote that had leaked from the drums into the ship's hold? If so, give details.

32d Interrogatory: Did you cause your ship and cargo to be surveyed in the said month of November, 1908?

33d Interrogatory: If it should be said that as a result of a survey, or at all, 741 drums of creosote carried on board your ship on said voyage were found damaged or worthless, and that 56,267 gallons of creosote were found to have been lost, what have you to say as to the truth or falsity of such statements?

34th Interrogatory: If your answer to the 33d Interrogatory is that such statements are false, please state in detail your reason for so testifying.

35th Interrogatory: Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause. If so, set forth the same fully and at large in your answer.

McCLANAHAN & DERBY,
Proctors for Respondent. [100]

[Title of Court and Cause.]

Cross-interrogatories to be Administered to Alexander Wallace.

Cross-interrogatories to be administered to Alexander Wallace, a witness to be produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction, now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libelant, and Thames & Mersey Marine Insurance Company, Ltd., is respondent, on the part and behalf of libelant in said cause.

1. Cross-interrogatory No. 1: Did you not make an extended protest as master of the bark "Sardhana," on December 28, 1908?

2. Cross-interrogatory No. 2: Did not George W. Wylie, as mate of said bark "Sardhana" at that time, and three seamen on said bark, join with you in such protest?

3. Cross-interrogatory No. 3: Did not you and

said Wylie and said seamen swear to such protest at Mukilteo, State of Washington, before one Wm. W. Olwell, a Notary Public?

4. Cross-interrogatory No. 4 : Did not such protest contain true copies of entries [101] in the log-book of said bark "Sardhana"?

5. Cross-interrogatory No. 5: Were not such entries in said log-book and such statements in said protest, true as made?

6. Cross-interrogatory No. 6: Did you not state in such protest as follows:

> Nov. 18th: "Stevedores continued to discharge the cargo and at 5:00 P. M. finished for the day. 291 further drums were discharged. About 9:30 P. M. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter,' the S. S. 'Hornelen' and the employees of the Pacific Creosoting Company who brought with them several chemical fire-extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel) and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the

lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

7. Cross-interrogatory No. 7: If your answers to any of the direct interrogatories propounded to you herein, are not in accordance with said statements in your said protest, or in accordance with the entries in said log-book, or if you now say that [102] the statements in said protest, or any of them, are not true, do you mean to have the Court understand that you swore falsely in making such protest?

8. Cross-interrogatory No. 8: Did you not testify as a witness in behalf of the Pacific Creosoting Company, libelant herein, in a cause pending in the above mentioned Court, in which Knohr & Burchard, Nfl., owners of the Danish ship "Jupiter," were libelants, and said Pacific Creosoting Company was respondent, being cause No. 3837 of said court, which had reference to a shipment of creosote from Liverpool to Eagle Harbor, on said Danish ship "Jupiter," during the year 1908?

9. Cross-interrogatory No. 9: Were you not examined as such witness in said last mentioned cause by one Ira A. Campbell, proctor for respondent and cross-libelant in said last mentioned suit?

10. Cross-interrogatory No. 10: Did you not testify as such witness in said last mentioned suit on January 18, 1909, at Seattle, Washington, in answer to the following questions, as follows:

"Q. I will hand you this document and ask you what it is.

A. This is an extended protest.

Q. Sworn to by you? A. Yes, sir.

Q. Before whom?

A. Before the notary public at Mukilteo.

Q. Just give us his name.

A. William W. Olwell.

Q. Is that your signature attached to that?

A. Yes, sir.

Q. What date did you swear to that?

A. On the 28th day of December, 1908.

Q. Does this extended protest refer to the matters concerning the present voyage from London to Puget Sound?

A. Yes, sir, from London to Puget Sound.

Q. Did you swear to any other extended protest? A. No.

Q. I will ask you whether or not the statement of facts contained in this protest relating to the weather which you encountered on your voyage, are true. [103]

A. That is quite true.

Q. I will ask you whether or not the statement of facts contained in this extended protest is a true copy of the entries in your log.

A. Quite true.

Q. You mean by quite true, entirely true?

A. Entirely true. The weather as it was recorded in the log-book is experienced; this is a copy of the original log."

11. Cross-interrogatory No. 11: Did you not testify truthfully as such witness?

12. Cross-interrogatory No. 12: If any of your answers to the direct interrogatories propounded to

you by respondent herein, or your answers to any of the cross-interrogatories propounded to you by libelant herein, are inconsistent with your testimony as such witness, do you now mean to have the Court understand that you testified falsely as such witness?

13. Cross-interrogatory No. 13: When was your attention called for the first time, to the matter of said fire, after you made said protest and gave your testimony as such witness?

14. Cross-interrogatory No. 14: How often and when has your attention been called to the matter of said fire since said time, and by whom, and how often have you thought of said matter since said time?

15. Cross-interrogatory No. 15: If you now testify differently from your said protest, or differently from your testimony as such witness, who suggested such change in your testimony, and when was such suggestion made?

16. Cross-interrogatory No. 16: Is it not true that when said fire was discovered on the "Sardhana" on November 18, 1909, a fire-alarm was sounded on said ship?

17. Cross-interrogatory No. 17: [104] Did not the members of the crew of the steamship "Hornelen" and/or the employees of the Pacific Creosoting Company respond to such alarm?

18. Cross-interrogatory No. 18: Is it not true that you had only commenced to unload the "Sardhana" the day before the fire, as stated in said protest? Is it not true that stores were piled on one side of the bulkhead which was burned, and that drums of creo-

sote, dunnage, etc., were piled on the other side?

19. Cross-interrogatory No. 19: Is it not true that the lumber and dunnage, and the lower decks of the "Sardhana" near said bulkhead, were saturated with creosote?

20. Cross-interrogatory No. 20: Did you not also make the following statements in said protest:

"1908.

May 30th: This vessel sailed from London with a cargo of creosote in iron drums bound for Eagle Harbor. Nothing to be noted here occurred until

June 6th: When it was discovered that the carpenter's sounding rod was very slightly colored with creosote.

July 11th: The crew were employed placing extra chocks amongst the cargo.

July 29th: The gale continued as before; likewise the sea. The vessel again rolled heavily and pitched badly. Later the squalls blew with hurricane force. The ship rolled and pitched badly in a high confused sea and much water was shipped on deck. Towards night it was discovered that the cargo in the hold had commenced to work. The crew entered the hold from the lazarette and secured it as well as possible.

July 30th: The gale still continued. The ship rolled and pitched heavily and took much water on deck, fore and aft. The cargo worked as before and the crew

again entered the hold to secure it. **[105]**

July 31st: The gale moderated the first part of the day but increased again later. Much water was shipped on deck. The cargo worked as before and the crew entered the hold through the ventilator hatch and secured it as well as possible.

Aug. 1st: A fresh gale was experienced and the ship rolled and pitched heavily in a high beam sea. Again the cargo worked.

Aug. 7th: The crew were employed securing the cargo.

Aug. 25th: A hard gale was encountered accompanied by a heavy sea. Much water was shipped on deck. The cargo worked again badly.

Aug. 26th: Similar conditions were experienced.

Aug. 31st. A moderate gale was experienced. The decks were frequently awash and the cabin and deck houses were flooded. The cargo worked heavily.

Sept. 1st: A moderate gale with hard squalls was experienced. The vessel shipped large quantities of water over all. The cargo worked heavily.

Sept. 4th: A strong gale was experienced accompanied by a high sea in which the vessel labored and strained badly. The cargo worked as before. The hold was entered through the main ven-

tilator and the drums were found to be adrift and were rolling about in all directions. It was impossible to secure the cargo until the weather moderated.

Sept. 14th: The crew were employed cutting up spare spars and blocking off the cargo with them.

Sept. 28th: It was noticed by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote.

Nov. 3d: Similar conditions were encountered and the cargo again worked badly.

Nov. 17th: Stevedores commenced to discharge the cargo and they discharged 136 drums."

21. Cross-interrogatory No. 21: Did you personally have charge of the discharge of the cargo of creosote from the "Sardana"?

22. Cross-interrogatory No. 22: Did you personally count damaged drums of the cargo delivered to the Pacific Creosoting Company from the "Sardana"? [106]

23. Cross-interrogatory No. 23: Did you personally measure any creosote of this cargo not in drums, which was delivered to the Pacific Creosoting Company?

24. Cross-interrogatory No. 24: Did not one Frank Walker, a marine surveyor of Seattle, Washington, survey said bark "Sardana" for said fire loss?

25. Cross-interrogatory No. 25: Did not said

Frank Walker also survey said bark "Sardana" and cargo, for loss of or damage to cargo during said voyage?

26. Cross-interrogatory No. 26: Did not said Frank Walker also make a survey for the loss of cargo from the barge which was overturned in the bay, while the "Sardana" was being unloaded?

27. Cross-interrogatory No. 27: If you say that the report of either of such surveys made by said Frank Walker is untrue in any particular, state whether or not you so testify of your own personal knowledge, or from what others have told you.

28. Cross-interrogatory No. 28: Is it not a fact that you had extremely severe weather on the said voyage from London to Eagle Harbor?

29. Cross-interrogatory No. 29: Is it not a fact that the cargo of drums worked on said voyage, and that some of said drums were damaged?

30. Cross-interrogatory No. 30: Did you not, in giving your testimony as a witness as above referred to, state as follows: "A damaged drum, in my opinion, would be one that was a detriment to the contents." [107]

31. Cross-interrogatory No. 31: In answering the direct interrogatories here propounded to you, did you not mean by "damaged drums" those which were so damaged as to be a detriment to the contents?

32. Cross-interrogatory No. 32: Did not some of the creosote of said cargo escape into the hold of said vessel, because of the very severe weather encountered on the said voyage?

33. Cross-interrogatory No. 33: Was not some of

said cargo of creosote lost because of such severe weather?

34. Cross-interrogatory No. 34: Was not said bark "Sardana," in your opinion, seaworthy and properly manned, equipped and provisioned in all respects, when she left London on said voyage, for the said voyage?

35. Cross-interrogatory No. 35. Was not said cargo, in your opinion, then properly stowed for the voyage you were then about to make?

36. Cross-interrogatory No. 36: Was not all damage to and loss of drums and/or creosote of said cargo, except the loss from the barge or lighter in the bay at Eagle Harbor, due to the severe weather encountered on said voyage?

37. Cross-interrogatory No. 37: Did you not testify as a witness, as aforesaid, as follows:

"Considerable of your cargo or some of your cargo was damaged, was it not?

A. Yes, there was.

Q. Some of the cargo worked on the voyage?

A. Yes.

Q. And that was caused by stress of weather, was it not?

A. Yes, by stress of weather." [108]

38. Cross-interrogatory No. 38: Did not you also testify as such witness as follows:

"Q. And some of the time you were unable to get down into the hold to look after the cargo at all? A. Yes, sir.

Q. And it was during that time that the cargo worked loose?

A. Well, it was working loose all the time during the bad weather; that was the first start of it.

Q. Now, you consider your cargo stowed properly to weather any kind of ordinary weather that you would anticipate on that voyage, didn't you? A. Yes.

Q. The way that cargo was stowed it would not have worked loose had you experienced ordinary weather, which you do experience at that time of year in that latitude and longitude, would it?

A. Well, moderate weather it would have been all right.

Q. Any weather that you would have expected?

A. Yes, sir.

Q. It would have stood? A. Yes, sir.

Q. Without working loose? A. Yes, sir.

Q. You say some of it did work loose, some of the drums were broken so that the creosote leaked out into the hold of your vessel?

A. Yes, sir.

Q. And some of the drums were dented?

A. Yes, sir.

Q. And otherwise injured? You say much water was shipped on deck?

A. Yes, she took quite a lot of water at times.

Q. The fact is that the weather you experienced in rounding the Horn on this voyage was exceptionally severe weather, was it not?

A. Yes, it was the worst weather I ever had coming around.

Q. And continued for an exceptionally long time. A. Yes.

Q. Can you tell about how long it took you to get around the Horn from the time you first struck the bad weather until you got around the other side?

A. I believe it was the best part of six weeks.

Q. Can you tell what the ordinary sailing time for a vessel like yours was to make that same voyage?

A. Well, we ought to have done it in about two weeks less, any way.

Q. You ought to have made it in four weeks?

A. Yes, we ought to."

39. Cross-interrogatory No. 39: Did not you and/or the ship's agent at Seattle have some trouble with the Pacific Creosoting Company, libelant in this case, relative to the payment of freight on the "Sardhana's" cargo [109]

40. Cross-interrogatory No. 40: Was not all of said cargo in apparent good order and condition when received on said ship?

BOGLE, MERRITT & BOGLE,
Proctors for Libelant.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Sep. 12, 1912. Frank L. Crosby, Clerk. By ————, Deputy. [110]

[Deposition of Alexander Wallace.]

[Title of Court and Cause.]

New York, 4 October, 1911.

Deposition of ALEXANDER WALLACE, taken under direct interrogatories and cross-interroga-

(Deposition of Alexander Wallace.)
tories propounded to said witness by me, Adeline Sessions, a notary public at the city of New York, State of New York, pursuant to stipulation for the taking of said deposition dated August 26, 1911, and signed by the proctors for the respective parties in the above-entitled suit.

The witness, ALEXANDER WALLACE, being by me duly sworn, deposes as follows:

To the 1st interrogatory the witness answers:

A. Alexander Wallace; age, 35; my home address is Elizabeth Street, Tayport, Fifeshire, Scotland.

To the 2d interrogatory the witness answers:

A. I was master of the British bark "Sardhana."

To the 3d interrogatory the witness answers:

A. I was master from the 9th of August, 1907, to the 3d of May, 1911. [111]

To the 4th interrogatory the witness answers:

A. On the 2d of May, 1911, at Dunkirk, in France.

To the 5th interrogatory the witness answers:

A. At Eagle Harbor, Washington. I was on board on that day.

To the 6th interrogatory the witness answers:

A. There was a small fire broke out in the after between-decks; it was a piece of bagging stuff, burlap, that caught fire in the between-decks.

To the 7th interrogatory the witness answers:

A. The nature of the fire—as regards the nature of the fire, I would say it was a very trifling affair; the damage to the ship was practically nothing. The lazarette door was slightly charred and blistered, a very small part of it. As far as I can remember,

(Deposition of Alexander Wallace.)

there were only about two feet or 2½ feet of it from the bottom of the door up that was blackened by the fire and a little bit charred.

To the 8th interrogatory the witness answers:

A. The fire was put out in about three minutes; not more than five minutes, anyway, by about half a dozen buckets of water being thrown on it.

To the 9th interrogatory the witness answers:

A. Absolutely none; there was an offer of outside assistance, but it was after the fire had been extinguished.

To the 10th interrogatory the witness answers:

A. No. **[112]**

To the 11th interrogatory the witness answers:

A. No, abolutely none at all.

To the 12th interrogatory the witness answers:

A. No.

To the 13th interrogatory the witness answers:

A. The only repairs that could have been done to the door was to give it a coat of new paint, and that would have been done in any case; I would say that there was no cost at all. The door would have been painted in any case, whether it had been burned or not.

To the 14th interrogatory the witness answers:

A. I understand that the door is on board the "Majestic," which is due to arrive here to-morrow, and I would recognize the door if it were here; but my vessel is in Philadelphia and I expect to sail thence to-morrow and it will not be possible for me to attend here to-morrow.

(Deposition of Alexander Wallace.)

To the 15th interrogatory the witness answers:

A. This can be done if it can be arranged that the door and I could be in the same port.

To the 16th interrogatory the witness answers:

A. I can tell you one difference without seeing it, and that is the marks that we put on it; we branded it with the branding irons, so that we would know it, with the ship's name on it.

To the 17th interrogatory the witness answers:

A. Yes.

To the 18th interrogatory the witness answers: [113]

A. It was made at Mulkiteo, State of Washington, near Seattle on the 28th day of December, 1908; that was made at the request of the Pacific Creosoting Company, Eagle Harbor, before William W. Olwell; the Pacific Creosoting Company asked me for the mate's log-book and I gave it to them, and thereafter they presented to me the extended protest for signature. I don't know where it is now.

To the 19th interrogatory the witness answers:

A. The trouble we had in extinguishing the fire was to get to where the fire was, as it had to be approached through the lazarette, and the floor space in the lazarette was occupied with the ship's stores, and we had to carry the buckets of water over the top of the stores, and the difficulty experienced was walking over barrels, getting over the obstructions. The bulkhead itself was not burned; it was the door that was burned, or charred, rather; if you are going to distinguish the door from the

(Deposition of Alexander Wallace.)

bulkhead I consider that the door is the bulkhead, or part of the bulkhead; and if you are going to mention the door and the bulkhead, I would say it was only the door that was burned. I was not responsible for the language of the extended protest or the entries in the mate's log. The fact is that only the door was scorched and slightly charred, in part, and I did not see and do not see any use in distinguishing between door and bulkhead, as I consider the door a part of the bulkhead.

To the 20th interrogatory the witness answers:

A. I would say it was false; the floor was not burned. **[114]**

To the 21st interrogatory the witness answers:

A. That is false, too.

To the 22d interrogatory the witness answers:

A. That is absolutely false.

To the 23d interrogatory the witness answers:

A. One part of it is true in so much that the stores were in the way and that the cargo was stored on the opposite side of the bulkhead; but the lumber was not saturated with creosote, and it was not hard work on the part of the crew of the steamer to extinguish the fire, except as I have explained above, and no outside assistance was rendered at all.

To the 24th interrogatory the witness answers:

A. Creosote in iron drums.

To the 25th interrogatory the witness answers:

A. In the lower hold and between-decks.

To the 26th interrogatory the witness answers:

A. It was being carried to Eagle Harbor and con-

(Deposition of Alexander Wallace.)
signed to the Pacific Creosoting Company.
To the 27th interrogatory the witness answers:

A. There was a small loss owing to leakage; the only loss is what we couldn't gather up again; bale up out of the bottom of the ship, out of the limbers; and the loss was what would stick to the bottom of the ship—you could hardly consider it as a loss. **[115]**

To the 28th interrogatory the witness answers:

A. There was a small leakage all over the cargo, but the biggest leakage was in the fore lower hold, and amidships abreast of the main ventilator where several drums broke adrift and were found to be cut.

To the 29th interrogatory the witness answers:

A. The creosote which leaked out of the drum was pumped out of the ship by the ship's crew into barrels supplied by the Pacific Creosoting Company. What couldn't be pumped out of the ship was baled out and put into the barrels; the Pacific Creosoting Company took delivery of that.

To the 30th interrogatory the witness answers:

A. I suppose there would be about two or three drums lost; it would take that much to wet the bottom of the ship all over.

To the 31st interrogatory the witness answers:

A. Yes; they took delivery of it; they received it as part of the cargo; they furnished the barrels to receive it in.

To the 32d interrogatory the witness answers:

A. Nothing further than the usual survey on the

(Deposition of Alexander Wallace.)

ship's arrival at any port; the hatches and the stowage of the ship was surveyed as usual. [116]

To the 33d interrogatory the witness answers:

A. I would say it was false.

To the 34th interrogatory the witness answers:

A. My reason for saying that is that the Pacific Creosoting Company took delivery of the cargo and never made any claims against the ship for damages to the cargo, or for shortage; the same as they did in the case of the "Jupiter"; the "Jupiter" was discharging the same time as we were. And further from verbal reports from the manager of the Pacific Creosoting Company's plant at Eagle Harbor, made to myself, that the cargo had burned out in good condition; also from my own knowledge as to the extent of the leakage and the way in which the creosote came out in the pumps and in the buckets.

To the 35th interrogatory the witness answers:

A. I can say that I think that part of the leakage was due to the drums not being strong enough, because we observed creosote in the limbers before we cleared the English Channel, so that all the leakage wasn't due to the drums that were damaged on the passage. As matter of fact I had rejected quite a number of drums in London of this same shipment, and all the drums were of the same general character. [117]

To the 1st cross-interrogatory the witness answers:

A. Yes.

To the 2d cross-interrogatory the witness answers:

A. Yes.

(Deposition of Alexander Wallace.)

To the 3d cross-interrogatory the witness answers:

A. Yes.

To the 4th cross-interrogatory the witness answers:

A. I believe so; I did not make the entries in the log-book, but I believe the entries were true in general.

To the 5th cross-interrogatory the witness answers:

A. The entries in the log-book were not made by me; but on analyzing the entries and making a careful or a minute examination of the parts of the ship said to be damaged, I find that several corrections should be made.

To the 6th cross-interrogatory the witness answers:

A. Yes.

To the 7th cross-interrogatory the witness answers:

A. I do not mean the Court to understand that I swore falsely in making the protest; but I mean the Court to understand that certain corrections should be made, and perhaps some of the language used in the protest is misleading because the fact is that although the alarm was responded to by the crews of the ships "Jupiter" and the steamship "Hornelen," and that some employees of the Pacific Creosoting Company brought with them chemical fire-extinguishers, the fire, as matter of fact, was put out, as I have testified, by the use of about half a dozen buckets of water, and the only difficulty was in getting to the fire [118] because of the obstructions I have mentioned; I went below into the lazarette and saw the glare of the fire through ventilation holes near the top of the bulkhead; the bulk-

(Deposition of Alexander Wallace.)

head reaches from one deck to the other and it would be impossible to see over it. I did not regard this statement, however, as of any importance and therefore did not correct it, the extended protest having been already prepared for my signature. As to the dunnage in the after between-decks, one or two small pieces in the immediate vicinity of the fire may have been charred in a way similar to the door. The ship's stores were damaged through the water being spilled on them. The chemical fire-extinguishers were used after the fire was put out, as a matter of precaution, and the stores were possibly damaged with chemicals also.

To the 8th cross-interrogatory the witness answers:

A. I answered certain questions before a court stenographer, in some court; but I do not remember the title of the action or who were the parties to it.

To the 9th cross-interrogatory the witness answers:

A. I believe that there was a Mr. Campbell who was one of the attorneys, but who he was attorney for and what was the name of the case I do not remember.

To the 10th cross-interrogatory the witness answers:

A. I do not remember in what suit it was, but the testimony quoted is in substance as I remember it.

[119]

To the 11th cross-interrogatory the witness answers:

A. I certainly intended to do so.

To the 12th cross-interrogatory the witness answers:

A. Certainly not.

To the 13th cross-interrogatory the witness answers:

(Deposition of Alexander Wallace.)

A. It was some time early in April this year; I don't remember the exact date.

To the 14th cross-interrogatory the witness answers:

A. I never heard of it again until my arrival in New York, and I have not thought of it very often; I have been busy with my other duties.

To the 15th cross-interrogatory the witness answers:

A. Nobody suggested any changes.

To the 16th cross-interrogatory the witness answers:

There was no fire on November 18th, 1909. I presume that the question refers to the fire of November 18th, 1908, and there was a fire-alarm sounded on the ship; but at the time the alarm was sounded it wasn't known whether the fire was serious or not; we never take any chances.

To the 17th cross-interrogatory the witness answers:

A. They responded, but the fire was out before they got there.

To the 18th cross-interrogatory the witness answers:

A. We started to discharge cargo a day or two days before the fire; I can't exactly say which; I don't think it is right to say that the stores were piled on one side of the bulkhead, or that the bulkhead was burned; they **[120]** were stowed there; the drums of creosote were stowed on the other side of the bulkhead.

To the 19th cross-interrogatory the witness answers:

A. Is not true.

To the 20th cross-interrogatory the witness answers:

A. I did; but the dates in the question in several instances skip intervening entries on other days not

(Deposition of Alexander Wallace.)

referred to in the question, and I wish to call attention to the fact that the "similar conditions" referred to in the entry of November 13th refer to weather experienced on November 2d as copied into the protest.

To the 21st cross-interrogatory the witness answers:

A. No; the cargo was discharged by stevedores who were under my supervision.

To the 22d cross-interrogatory the witness answers:

A. No; the damaged drums were counted by the mate.

To the 23d cross-interrogatory the witness answers:

A. I did not personally measure any cargo, not in drums; but I am satisfied myself that all of the creosote that had leaked out of the drums was delivered to the Pacific Creosoting Company. I was an eye-witness.

To the 24th cross-interrogatory the witness answers:

A. Certainly not, to my knowledge.

To the 25th cross-interrogatory the witness answers:

A. Frank Walker was not the man that I knew to be the surveyor for the Pacific Creosoting Company; it was another man altogether; I never saw Frank Walker on board **[121]** the ship at *11*; I know him well.

To the 26th cross-interrogatory the witness answers:

A. I don't know whether he did or not; I had delivered that cargo and got receipt for it.

To the 27th cross-interrogatory the witness answers:

A. My testimony is all of my own personal knowledge, and where the report of Mr. Walker is incon-

(Deposition of Alexander Wallace.)

sistent with my testimony his report is wrong.

To the 28th cross-interrogatory the witness answers:

A. We had bad weather, yes.

To the 29th cross-interrogatory the witness answers:

A. Some of the drums worked and some of the drums were damaged on that account.

To the 30th cross-interrogatory the witness answers:

A. Yes; by "detriment to the contents" I mean so that the contents could leak out.

To the 31st cross-interrogatory the witness answers:

A. Yes.

To the 32d cross-interrogatory the witness answers:

A. Some of it did; not all of it. We knew that there was creosote in the limbers before we encountered any bad weather at all; the entry of June 9th covers that.

To the 33d cross-interrogatory the witness answers:

A. I didn't consider that any creosote was lost at all; it was all delivered to the Pacific Creosoting Company and they made no claim for lost creosote at all. **[122]**

To the 34th cross-interrogatory the witness answers:

A. Yes, she was seaworthy in all respects.

To the 35th cross-interrogatory the witness answers:

A. It was properly stowed.

To the 36th cross-interrogatory the witness answers:

A. The damage to the drums was due to the bad weather encountered, except such of the drums as were inherently defective, and permitted the leakage which we found before the rough weather came on; there was no loss of drums.

(Deposition of Alexander Wallace.)

To the 37th cross-interrogatory the witness answers:

A. Yes.

To the 38th cross-interrogatory the witness answers:

A. In substance it seems to me what I testified to.

To the 39th cross-interrogatory the witness answers:

A. No, there was no question of payment of the freight at all; it was paid in full.

To the 40th cross-interrogatory the witness answers:

A. Yes; I rejected what we considered bad drums.

ALEXANDER WALLACE.

ADELINE SESSIONS. [123]

[Indorsed]: Deposition of Alexander Wallace, taken under direct interrogatories and cross-interrogatories. New York, October 4, 1911. Filed in the U. S. District Court, Western Dist. of Washington. Sept. 12, 1912. Frank L. Crosby, Clerk. By ————, Deputy. [124]

[Title of Court and Cause.]

Direct Interrogatories to be Propounded to E. D. Rood.

Direct interrogatories to be propounded to E. D. Rood at Los Angeles, California, a witness produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction, now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libellant, against Thames & Mersey Marine Insurance Company, Ltd., respondent, on behalf of said libel-

lant, in accordance with the stipulation hereto annexed:

Interrogatory No. 1: State your name, age, residence and occupation.

Interrogatory No. 2: What was your occupation in the month of November, 1908?

Interrogatory No. 3: If your answer to Interrogatory No. 2 is that you were Assistant Manager of the Pacific Creosoting Company, a corporation, libellant herein, state how long you had been such officer, and how long you remained such after November, 1908.

Interrogatory No. 4: Were you on board the bark "Sardhana," after she arrived at the plant of libellant in Eagle Harbor, on November 9, 1908?

Interrogatory No. 5: If you state that you were on board said vessel after her said arrival, state when you first went on board her, and how often you were aboard said vessel thereafter.

Interrogatory No. 6: Did you see the condition of the cargo on said vessel before and/or at the time the same was discharged therefrom? [125]

Interrogatory No. 7: If you answer the last interrogatory in the affirmative, state fully in what condition you found said cargo of said vessel.

Interrogatory No. 8: If you say that any part of the iron drums composing said cargo were damaged, state the number of such damaged drums, as near as you can, and the extent of the injury thereto.

Interrogatory No. 9: Had any part of said cargo escaped into the hold of said vessel?

Interrogatory No. 10: Was all of the creosote of

said cargo delivered to the Pacific Creosoting Company, libellant herein, and if not, state if you know, the amount of such short delivery.

Interrogatory No. 11: Did you know of a fire occurring on board said bark "Sardhana" on November 18, 1908?

Interrogatory No. 12: Were you on board said vessel at the time of said fire, and/or at any time thereafter?

Interrogatory No. 13: State fully all you know of your own knowledge concerning said fire, the nature and extent thereof, the parts of the ship damaged thereby, the nature and amount of damage to said ship and cargo, and what difficulties, if any, were encountered in extinguishing said fire.

Interrogatory No. 14: State, if you know, what if any cargo was piled on the 'tween-decks of said ship, at or near the bulkhead where said fire occurred, and what if any, stores were in the lazarette at or near the said bulkhead.

Interrogatory No. 15: Was or was not the dunnage and lumber near said bulkhead more or less covered with creosote, and if so, was or was not such dunnage and lumber more inflammable because of such fact?

Interrogatory No. 16: State, if you know, whether or not any repairs were made on said ship on account of said fire, and if such repairs were so made, by whom were they made.

Interrogatory No. 17: State, if you know, whether or not a lighter alongside said vessel, loaded with drums of creosote from said vessel, capsized on

November 21, 1908; and if you say that it did, state fully the circumstances connected therewith, the amount of cargo thereon, and what became of such cargo.

Interrogatory No. 18: If you say said lighter did capsize and drums of creosote from said cargo were thereby precipitated into the sea, state fully what was afterwards done to recover the same, how many, if any, were recovered, how many, if any, were not recovered, and what if any expense was incurred in recovering said lost cargo. [126]

Interrogatory No. 19: Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination, on the matters in question in this cause. If so, set forth the same fully and at large in your answer.

BOGLE, MERRITT & BOGLE,
Proctors for Libelant. [127]

[Title of Court and Cause.]

Cross-interrogatories to be Propounded to E. D. Rood.

Cross-interrogatories to be propounded to E. D. Rood at Los Angeles, California, a witness produced, sworn and examined in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States for the Western District of Washington, Northern Division, wherein Pacific Creosoting Company, a corporation, is libel-

ant, against Thames & Mersey Marine Insurance Company, Ltd., respondent, on behalf of said respondent, in accordance with the stipulation hereto annexed:

Cross-interrogatory No. 1: Did one Frank Walker make a survey of the cargo of creosote on board the "Sardhana" to determine how much creosote was lost?

Cross-interrogatory No. 2: Who employed him to make such survey?

Cross-interrogatory No. 3: State in detail how he ascertained the amount of creosote lost. [128]

Cross-interrogatory No. 4: Upon how much creosote did the Pacific Creosoting Company pay freight to the owners of the "Sardhana"?

Cross-interrogatory No. 5: State upon exactly what data you base your estimate of the amount of creosote lost.

Cross-interrogatory No. 6: If in answer to the last cross-interrogatory you say that said data includes certain documents, please produce such documents, state when and by whom each one was made and attach the same to your deposition.

Cross-interrogatory No. 7: State in detail the nature of the examination which you personally made to ascertain the condition of the "Sardhana's" cargo and the amount of creosote lost.

Cross-interrogatory No. 8: Do you know from personal observation or measurement how much creosote had escaped from the drums and was awash in the hold of the vessel upon her arrival at Eagle Harbor?

Cross-interrogatory No. 9: Do you know from personal knowledge what was done with said creosote that was so awash in the hold of the vessel? If so, state in detail what was done with it.

Cross-interrogatory No. 10: Was not some of said creosote which was awash in the hold of the vessel pumped or baled into barrels and/or other receptacles provided by the Pacific Creosoting Company and, if so, how many barrels and/or other receptacles were so provided, and how much creosote was so pumped or baled into them? [129]

Cross-interrogatory No. 11: Was Mr. Walker informed as to the amount of creosote so saved that had been awash in the hold of the "Sardhana"?

Cross-interrogatory No. 12: Do you know of your own personal knowledge as distinguished from hearsay how long it took to put out the fire which occurred on the "Sardhana" on November 18, 1908, or the means used in extinguishing it? If so, state from such personal knowledge how long the fire burned and the means used in its extinguishment. Please give only facts known to you personally in answering the above.

Cross-interrogatory No. 13: Was any creosote burned in said fire?

Cross-interrogatory No. 14: If the creosote was stowed near the bulkhead where said fire occurred, how can you explain the fact that it did not take fire?

Cross-interrogatory No. 15: State from your personal knowledge and not from hearsay whether the crews of the "Jupiter" and "Hornelin" did any

work in the actual extinguishment of the fire and, if so, state just what you know from personal observation said work consisted of.

Cross-interrogatory No. 16: Do you know from personal knowledge whether the entire bulkhead forward of the lazarette was burned in said fire and, if you know it was not entirely burned, state if you can from personal knowledge how much of it was burned. [130]

Cross-interrogatory No. 17: Do you know from personal knowledge whether the entire door of said bulkhead was burned in said fire and, if you know it was not entirely burned, state if you can from personal knowledge how much of it was burned.

Cross-interrogatory No. 18: Do you know from personal knowledge if there was any dunnage burned in said fire and, if your answer is in the affirmative, state if you can from personal knowledge how much was burned and where said dunnage which was burned was located.

Cross-interrogatory No. 19: Do you know from personal knowledge if the floors and ceilings of the ship near said bulkhead were burned and, if so, state from your personal knowledge the extent to which the floor and/or ceiling was burned.

Cross-interrogatory No. 20: Do you know from personal knowledge as distinguished from hearsay that repairs were made on the "Sardhana" as a consequence of said fire? If so, state from such personal knowledge and in detail the location and extent of any such repairs, at whose order they were made and by whom they were made.

Cross-interrogatory No. 21: State upon exactly what data you based your estimate as to the amount of creosote capsized on the lighter, the amount saved thereafter and the expenses incurred in saving the same.

Cross-interrogatory No. 22: If, in answer to the last cross-interrogatory, you state that said data includes certain documents, please [131] produce such documents, state when and by whom the same were made and attach the same to your deposition.

_____,

Proctors for Respondent. [132]

[Title of Court and Cause.]

Deposition of E. D. Rood.

ANSWERS OF WITNESS, E. D. ROOD, TO DIRECT AND CROSS INTERROGATORIES HERETO ATTACHED.

E. D. ROOD, a witness for libellant in the above-entitled cause, being first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said cause, made answer to the said respective direct interrogatories and cross-interrogatories as follows:

Answering Direct Interrogatory 1, witness says:

My name is Edson Dudley Rood; age thirty-four years; residence, Los Angeles, California; no occupation.

Answering Direct Interrogatory 2, witness says:

Assistant Manager of the Pacific Creosoting Company.

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Answering Direct Interrogatory 3, witness says:

About a year and a half before November, 1908, and up to April 1909, afterwards.

Answering Direct Interrogatory 4, witness says:

I was.

Answering Direct Interrogatory 5, witness says:

I went on board the vessel the day after she arrived for the first time, and was on board a number of times afterwards. I do not remember exactly how many.

Answering Direct Interrogatory 6, witness says:

I saw the cargo before same was discharged and at different times while it was being discharged.

Answering Direct Interrogatory 7, witness says:

The first time I looked at the cargo we went down into No. 1 hatch before the cargo was broken loose. It appeared to be well stowed and in fairly good condition. As I saw the cargo at different times while it was being discharged I observed a number of damaged drums.

Answering Direct Interrogatory 8, witness says:

To the best of my recollection there were about seven hundred and fifty or eight hundred damaged drums. These were dented on the ends; the chimes were badly bent; some of them had holes in them—in the sides, and they were all leaky, and a number were empty. [133]

Answering Direct Interrogatory 9, witness says:

To the best of my knowledge and belief some of the cargo was in the bottom of the hold.

Answering Direct Interrogatory 10, witness says:

(Deposition of E. D. Rood.)

It was not all delivered. My recollection is that about fifty thousand or sixty thousand gallons were short.

Answering Direct Interrogatory 11, witness says:

I did.

Answering Direct Interrogatory 12, witness says:

I was on board at the time of the fire from the time the alarm was turned in until the fire was extinguished.

Answering Direct Interrogatory 13, witness says:

My first knowledge of the fire was when the alarm was turned in. I got aboard as quickly as I could and found a large number of men aboard working on the fire with chemical fire extinguishers. A large quantity of smoke was coming out of the lazarette into the cabin. This was quite stifling, and as there were men down in there handling extinguishers, I did not go down into the lazarette to see the fire myself, but stayed on deck and helped pass fire-extinguishers and water down below. I do not know the extent of damage, nor I do not know the nature or amount of damage done. The fire appeared to be quite stubborn, and a great deal of difficulty was found in putting it out. To my best recollection from the time the fire alarm was turned in until the fire was put out was about an hour.

Answering Direct Interrogatory 14, witness says:

Well, I was not down there, so I do not know whether there was any cargo stowed between-decks at the time of the fire or not, nor do I know what stores were in the lazarette.

(Deposition of E. D. Rood.)

Answering Direct Interrogatory 15, witness says:

The dunnage in between-decks was covered with creosote from the leaky drums. This made it more inflammable.

Answering Direct Interrogatory 16, witness says:

I do not know of any repairs.

Answering Direct Interrogatory 17, witness says:

There was a lighter of drums of creosote alongside the vessel that capsized on November 21, 1908. This lighter was capsized on account of the unusually heavy weather at this time. The seas and swells rolled in and it was impossible for the lighter to weather the storm. My recollection is that there were about two hundred and sixty drums aboard the scow or lighter when it capsized. These drums sank to the bottom. [134]

Answering Direct Interrogatory 18, witness says:

As soon as it was learned that the scow of drums had capsized, the launch "Pacific," owned by the Pacific Creosoting Company, was set to work and recovered about fifteen drums on the beach opposite the plant of said company. These floated to the beach because they were light being empty or only partially filled with creosote. About two hundred and fifty drums, from my best recollection, were recovered by a diver named Finch. There were four drums that were not recovered at all. The expense incurred in recovering these drums was made up as follows: The use of the launch "Pacific" and men of the Pacific Creosoting Company for about three hours time; contract with the diver, Finch, at four

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dollars per drum for each drum recovered; the use of the scow at ten dollars per day, upon which were placed the drums recovered by Finch; delivering the scow from Eagle Harbor; the use of the pile driver grappling the drums recovered by Finch and placing them on the scow. I do not remember the different amount of these charges.
Answering Direct Interrogatory 19, witness says:
I remember nothing further.

ANSWERS TO CROSS-INTERROGATORIES:
Answering Cross-interrogatory 1, witness says:
Mr. Frank Walker made a survey of the cargo of the "Sardhana" to determine the loss and condition of the cargo.
Answering Cross-interrogatory 2, witness says:
I did.
Answering Cross-interrogatory 3, witness says:
I do not know how he ascertained the amount of creosote lost.
Answering Cross-interrogatory 4, witness says:
I do not remember.
Answering Cross-interrogatory 5, witness says:
At the time this loss was estimated I looked over the damaged drums myself, and was given figures by employees of the Pacific Creosoting Company showing the amount of creosote dumped from the damaged drums and the shortage. These figures were made up by the men who dumped the drums, and were made at the same time the drums were emptied.
Answering Cross-interrogatory 6, witness says:

(Deposition of E. D. Rood.)

My estimate is from personal recollection from the data given me at that time. I have no data with me now, or in my possession.

Answering Cross-interrogatory 7, witness says:

My first examination of the cargo was through No. 1 hatch before same was broken loose and before they had commenced to discharge. I examined the cargo at different times thereafter as it was brought ashore on the scows and rolled off on to the landing of the Pacific Creosoting Company. I saw some of the damaged drums dumped, and I know there was a loss because they were only partially filled. The loss determined by employees of the Pacific Creosoting Company measuring the creosote which was dumped from the damaged drums into a receptacle with a capacity for a fixed quantity of creosote.

Answering Cross-interrogatory 8, witness says:

I do not know that there was any creosote awash in the hold of the vessel. [135]

Answering Cross-interrogatory 9, witness says:

As I stated in answer to cross-interrogatory 8, I do not know of any creosote awash in the hold of the vessel.

Answering Cross-interrogatory 10, witness says:

I know of no such circumstance.

Answering Cross-interrogatory 11, witness says:

I do not know.

Answering Cross-interrogatory 12, witness says:

From the time the alarm was turned in until the fire was put out I recollect was about an hour. The means used in extinguishing the fire were chemical

extinguishers and water.

Answering Cross-interrogatory 13, witness says:

No.

Answering Cross-interrogatory 14, witness says:

I do not know that the creosote was stowed near the bulkhead at the time of the fire.

Answering Cross-interrogatory 15, witness says:

I saw men aboard the "Sardhana" working to put out the fire whom I recognized as belonging to the crews of the "Jupiter" and "Hornelin." They were passing extinguishers and working with the rest of us to put out the fire.

Answering Cross-interrogatory 16, witness says:

I did not see the bulkhead forward of the lazarette after the fire.

Answering Cross-interrogatory 17, witness says:

I did not see it.

Answering Cross-interrogatory 18, witness says:

I was not down in between-decks at the time of the fire, so did not see any dunnage burning.

Answering Cross-interrogatory 19, witness says:

No, I do not know whether they were burned or not.

Answering Cross-interrogatory 20, witness says:

I have no knowledge of the facts called for in that question or anything about it.

Answering Cross-interrogatory 21, witness says:

I base my estimate of the amount of creosote on the lighter upon personal recollection from data that I saw at the time of the loss. This data was prepared by the men who checked the loading of the

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lighter. The amount saved thereafter I estimate from recollection of having made the contract with the diver and paid his bill for the work, and other minor charges that came up with rescuing the cargo, the bills for which I paid at the time, but I do not recall what amounts they were.

Answering Cross-interrogatory 22, witness says:

I have no documents or data. My estimate is from personal recollection.

[Seal] E. D. ROOD.

Subscribed and sworn to before me this 19th day of July, A. D. 1911.

O. P. LOCKHART,

Notary Public in and for the State of California, Residing at Los Angeles. [136]

[Indorsed]: Deposition of E. D. Rood. Taken at Los Angeles, Cal., July 17, 1911, Before O. P. Lockhart, Notary Public, Pursuant to Stipulation Thereto Attached. Filed in the U. S. District Court, Western Dist. of Washington. July 24, 1911. R. M. Hopkins, Clerk. [138]

[Deposition of George H. Wylie.]

[Title of Court and Cause.]

The deposition of GEORGE H. WYLIE, taken on the 28th day of June, A. D. 1911, at the Chambers of J. Burke Hendry, the Commissioner, 7 New Square, Lincoln's Inn, London, W. C., County of Middlesex, United Kingdom of Great Britain and Ireland, and to be read as evidence in behalf of the

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respondent in the above-entitled action pending in the District Court of the United States, Western District of Washington, Northern Division.

Percival C. Hollis of 36 Jersey Road, Ilford, a stenographer and disinterested person, is appointed by the Commissioner to take down the deposition in shorthand, he being duly sworn to take correct notes of the deposition in shorthand and make a faithful transcript thereof into typewriting.

GEORGE H. WYLIE, of 43 Eaton Terrace, London, S. W., a certificated master mariner, aged 27 years and upwards, being duly and publicly sworn pursuant to the directions hereunto annexed, and examined on the part of the respondent, doth depose and say as follows:

1st Interrogatory: State your name, age, residence and occupation.

Answer: George Henry Wylie; aged 27; residence 43 Eaton Terrace, London, S. W.; occupation Certificated Master Mariner.

2d Interrogatory: What was your occupation in the month of November, 1908?

Answer: First mate to the "Sardhana." [139]

3d Interrogatory: If your answer to the 2d Interrogatory is that you were mate of the British bark "Sardhana," state how long you had been such mate and how long you remained such after November, 1908.

Answer: I was mate of the "Sardhana" from the 4th April, 1908, to the 3d May, 1911.

4th Interrogatory: When were you last on board the

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bark "Sardhana" and where was she at the time?

Answer: 3d May, 1911, at Dunkirk.

5th Interrogatory: Where was said bark on November 18, 1908, and were you then on board of said bark?

Answer: Eagle Harbor, Washington; I was on board for the greater part of the day—all the day except a few minutes.

6th Interrogatory: Did anything unusual happen on said bark on said day, and, if so, what was it?

Answer: A fire broke out in the after 'tween-decks.

7th Interrogatory: If your answer to the 6th Interrogatory is that there was a fire on board said bark on said day, state in detail the nature and extent of said fire, the parts of the ship damaged by it and the nature and amount of said damage.

Answer: The extent of the fire was very slight; no part of the ship was damaged to any extent. The parts were, the door of the lazarette bulkhead was affected by the fire, that is, it was scorched and a small portion was slightly more than scorched, perhaps slightly charred by the flames. There was no damage to the bulkhead bar, a very slight blistering of a small portion of the paint.

8th Interrogatory: State in detail the means used and the length of time it took to extinguish said fire.

Answer: The means used were half a dozen buckets of water; the time was less than five minutes.

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9th Interrogatory: In the work of actually extinguishing said fire, was any outside assistance rendered?

Answer: No, the outside assistance arrived after the fire was extinguished.

10th Interrogatory: Was a survey held on account of said fire?

Answer: No.

11th Interrogatory: Were any repairs made to your ship on account of said fire?

Answer: No.

12th Interrogatory: Were any repairs made necessary thereby?

Answer: No.

13th Interrogatory: If your answer to the 11th Interrogatory is that no repairs were made on account of said fire, state, if you know, what would have been the approximate cost of such repairs if they had been made.

Answer: All the repairs that were rendered necessary were simply a rub with a paint brush; the approximate cost would be 1d. or 2d.—the cost of a brush full of paint.

14th Interrogatory: If in answer to the 7th Interrogatory you state that the door of the wooden bulkhead separating the lazarette from the after 'tween-decks was damaged by said fire, state whether you can identify said door at the present time.

Answer: Yes, I can.

15th Interrogatory: If your answer to the 14th In-

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terrogatory is in the affirmative, please state whether or not the door now before the Commissioner and introduced as a part of the deposition of Alexander Wallace is said door.

Answer: It is the said door, and is branded in 7 places with the word "Sardhana." This branding was done by me on the date of the [141] shipment of the door from Dunkirk, which was at the end of April, 1911, at which time I detached the door from the bulkhead of the "Sardhana."

DOOR PRODUCED TO WITNESS; IDENTIFIED BY HIM; MARKED "EXHIBIT G. H. W. 1"; SIGNED BY WITNESS AND COMMISSIONER AND FORMALLY PUT IN EVIDENCE.

16th Interrogatory: If your answer to the 15th Interrogatory is in the affirmative, please state whether said door at this time is in the exact condition as it was immediately after said fire. If not, state what is the difference in condition.

Answer: There is no difference; it is in exactly the same condition.

17th Interrogatory: The Pacific Creosoting Company, libelant in this case, has been asked certain questions in regard to the nature and extent of the fire on board the "Sardhana," to which you have testified, and in answering one of the interrogatories propounded to it, said libelant says that the floors and ceiling of the "Sardhana," near the bulkhead, were burnt by the said

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fire. Is that statement true or false?

Answer: False.

18th Interrogatory: Further answering another interrogatory propounded to it with reference to said fire, said libelant says that two-thirds of the said bulkhead were burnt and charred by the said fire. Is that statement true or false?

Answer: That is also false.

19th Interrogatory: Further answering another interrogatory propounded to it with reference to said fire said libelant says that the damage caused to the "Sardhana" by said fire was such as to require repairs, and that the repairs were made by the ship's carpenter and consisted of removing the burnt bulkhead and building a new one in its place. Is that statement true or false?

Answer: Absolutely false.

20th Interrogatory: Further answering another interrogatory propounded to it with reference to the difficulties encountered in extinguishing the fire, libelant says: "That the difficulties encountered in extinguishing the fire were that stores were [142] piled on one side of the bulkhead and drums of creosote, dunnage, etc., on the other, and that the lumber was saturated with creosote making the same very inflammable, and that it required hard work on the part of the crew of the 'Sardhana' and the persons so assisting them to extinguish the fire." Is this statement with reference to the difficulties en-

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countered in extinguishing the said fire true or false?

Answer: The difficulties encountered in extinguishing the fire were the difficulties that a man encounters in trying to walk over barrels, some full, some empty and some half full, and cases of various other stores that were piled in the way. The difficulty was really to approach the fire, not to actually put it out. Once it was approached, it was extinguished in a few minutes.

21st Interrogatory: What cargo was the "Sardhana" carrying in November, 1908?

Answer: Creosote in drums.

22d Interrogatory: Where was said cargo stowed on said vessel?

Answer: In the hold and 'tween-decks.

23d Interrogatory: Where was said cargo being carried to, and to whom was it consigned?

Answer: It was being carried to Eagle Harbour, Washington, and it was consigned to the Pacific Creosoting Company.

24th Interrogatory: Was said cargo, or any part thereof, lost during the voyage to the port of Eagle Harbor, and, if so, state the details of how such loss occurred and the amount of such loss.

Answer: There was no loss.

25th Interrogatory: If in answer to the 27th Interrogatory you say, *inter alia,* that there was a leakage of certain creosote in drums on board said bark, state in what part of the ship said leakage took place. [143]

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Answer: I have not yet answered the 27th Interrogatory. When I have heard that interrogatory I will answer the 25th and 27th interrogatories together.

26th Interrogatory: What, if anything, was done with the creosote which had leaked out of the drums? Give full details.

Answer: The creosote which had leaked out of the drums remained in the ship until it was pumped out by the ship's pump through the hose purchased for the purpose into empty barrels supplied by the Pacific Creosoting Company. We pumped down to 3 or 4 inches, until the pumps refused to draw any more, and the remainder was baled out and passed up in buckets, etc., and poured into the empty barrels. They got every drop it was possible to bail out, and then, of course, we had to wash out. That is all the creosote that was lost.

27th Interrogatory: State, if you can, approximately how much of said creosote which so leaked out of the drums was lost.

Answer: Nothing, but what we could wash out of the limbers. It is really as much as you could wash off the sides of a cement lined chamber,—infinitesimal.

28th Interrogatory: Did the Pacific Creosoting Company have anything to do with the creosote that had leaked from the drums into the ship's hold? If so, give details.

Answer: I have already given the details in my an-

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swer to Interrogatory 26th. They received it as set forth fully therein.

29th Interrogatory: Did the master of the "Sardhana" cause the ship and cargo to be surveyed in the said month of November, 1908?

Answer: No other survey than the ordinary one of hatches at the termination of the voyage.

30th Interrogatory: If it should be said that as a result of a survey, or at all, 741 drums or creosote carried on board your ship [144] on said voyage were found damaged or worthless, and that 56,267 gallons of creosote were found to have been lost, what have you to say as to the truth or falsity of such statements?

Answer: The number I cannot state, but the number of damaged drums certainly did not amount to anything like 741; the statement that 56,267 gallons of creosote were lost is absolutely false.

31st Interrogatory: If your answer to the 30th Interrogatory is that such statements are false, please state in detail your reason for so testifying.

Answer: As to the damaged drums there was a United States Custom-house Officer on board tallying the drums for the customs dues; I tallied the drums for the ship, and a tally clerk for the Pacific Creosoting Company. Any drum that was damaged, even to the extent of being slightly dented, he called damaged. The drums I and the Custom-house Officer termed damaged were drums that were holed or so badly dented as to

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be unfit to carry liquids in future, and those did not amount to anything like that number of 741. The exact number I cannot say even approximately now. As to the loss of fifty-six thousand odd gallons, that is absolutely false. My reason for stating that there were not fifty-six thousand odd gallons of creosote lost is that I was on board the ship the whole time, and I know the creosote was loaded in the ship in London and was delivered in Eagle Harbor to the last drop, bar what we washed off the limbers. No creosote could have gone over the side without my knowledge. There was no water in the ship, nor any leakage of the ship. The creosote that leaked went into the limbers of the ship and could not possibly get out of the ship. There was 13 inches of creosote in the well on arrival in Eagle Harbour. That remained until pumped out as before stated. [145]

32d Interrogatory: Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If so, set forth the same fully and at large in your answer.

Answer: I can state that to my knowledge Captain Wallace, at that time Master of the "Sardhana," wrote to the owners of the ship on November 23d, 1908, that the fire was of a very trivial nature, in

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the following words: "However, we managed to get it extinguished before any damage was done to the ship." I will hand in as evidence a letter written by Captain Alexander Wallace in Dunkirk on April 19th and 20th, 1911, to Messrs. Andrew Weir & Co., which was also signed by me. This will avoid repetition and the reading of the contents of the letter, as all I could say in addition is contained in that letter.

LETTER PRODUCED BY WITNESS; MARKED "EXHIBIT G. H. W. 2"; SIGNED BY WITNESS AND COMMISSIONER AND FORMALLY PUT IN EVIDENCE.

Cross-interrogatory No. 1: Did you not join with Alexander Wallace, then master of the bark "Sardhana," in an extended protest on December 28, 1908?

Answer: Yes, I did.

Cross-interrogatory No. 2: Did not three seamen of said bark also join with you and said Master in said extended protest?

Answer: Yes, they did.

Cross-interrogatory No. 3: Did you not swear to such protest at Mukilteo, State of Washington, before one Wm. W. Olwell, a Notary Public?

Answer: Yes. [146]

Cross-interrogatory No. 4: Did not such protest contain true copies of entries in the log-book of said bark "Sardhana"?

Answer: Yes, it did.

Cross-interrogatory No. 5: Were not such entries in

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said log-book and such statements in said protest, true as made?

Answer: Yes, they were.

Cross-interrogatory No. 6: Did not such protest contain the following statement: "Nov. 18th: Stevedores continued to discharge the cargo and at 5:00 P. M. finished for the day. 291 further drums were discharged. About 9:30 P. M. smoke was discovered issuing from the after-hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter,' the S. S. 'Hornelen' and the employees of the Pacific Creosoting Company who brought with them several chemical fire-extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel) and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

Answer: The protest contained that statement.

Cross-interrogatory No. 7: If any of your answers to the foregoing cross-interrogatories or to the di-

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rect interrogatories propounded to you by respondent herein, are inconsistent or different from the statements in said protest, do you now mean to have the Court understand that you swore falsely to said protest?

Answer: No, but I think I might explain one statement of that protest. [147] It states there that the captain saw the reflection of the flames over the top of the bulkhead. That is an impossibility. The bulkhead extended up to the upper deck. Where the captain saw the reflection of the flames was through ventilation holes cut into the bulkhead. That is the only part of the statement with which I can find fault. The ventilation holes were a few inches from the top of the bulkhead. By the word "burned" in that protest I mean "scorched" or to a slight extent affected by fire.

Cross-interrogatory No. 8: On the evening of November 18, 1908, didn't you go to the home of M. I. Helman, Chief Engineer of the Pacific Creosoting Company's plant at Eagle Harbor?

Answer: Yes.

Cross-interrogatory No. 9: While you were so at the home of said Helman, did you not hear a fire-alarm from aboard the "Sardhana"?

Answer: Yes.

Cross-interrogatory 10: Did not you, together with others then present at said place, go immediately to the said ship?

Answer: No, I did not go with others; they stopped

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to do something. I immediately went up myself. I was aboard the ship in less than 5 minutes from the time the alarm bell was rung. I did not stop to do anything. I took myself off in a boat.

Cross-interrogatory 11: Didn't you and others procure fire-extinguishers from the said plant and take them to said ship, for the purpose of using the same for extinguishing the fire on board said ship?

Answer: I did not; others did. I made my way direct on board.

Cross-interrogatory No. 12: Didn't you then find smoke issuing from the after-cabin and after-hold of said ship?

Answer: Yes, to a certain extent there was smoke issuing, but the smoke was not dense. As a matter of fact I went on board [148] the ship and went immediately down below and was down ¾ of an hour without going up so the smoke was not dense, not so dense as to prevent me from staying down for ¾ of an hour. Of course, there was smoke, but not to any extent.

Cross-interrogatory No. 13: Did not members of the crew of the steamship "Hornelen" lying near, also respond to said fire-alarm?

Answer: Yes, they answered the fire-bell and came.

Cross-interrogatory No. 14: Did not members of the crew of the ship "Jupiter" lying near, also respond to said fire-alarm?

Answer: The crews of both ships responded to the

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fire-alarm but before their arrival the fire was out.

Cross-interrogatory No. 15: Is it not true that the after 'tween-decks near the bulkhead, where said fire started, were then full or partly full of cargo?

Answer: Partly full.

Cross-interrogatory No. 16: Is it not true that the lazarette of said ship near said bulkhead, then contained ship's stores?

Answer: Quite true.

Cross-interrogatory No. 17: Is it not true that the dunnage and lumber in the after 'tween-decks near said bulkhead, were more or less covered with creosote?

Answer: Yes.

Cross-interrogatory No. 18: Is it not true that more or less difficulty was encountered in extinguishing said fire?

Answer: The difficulty encountered was not in extinguishing the fire but in approaching the fire as I have already described.

Cross-interrogatory No. 19: When was your attention for the first time called to the matter of said fire, after you made said protest?

Answer: In April, 1911, at Dunkirk. I refer to the letter I have produced "Exhibit G. H. W. 2," in reply to Interrogatory 32. [149]

Cross-interrogatory No. 20: How often and when has your attention been called to the matter of said fire since said time, and by whom; and how often

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have you *through* of said matter since said time?

Answer: Until that date, the 19th of April, 1911, my attention had never been called to the fire at all since extending the protest, and not since that date until yesterday, the 27th June, 1911, when arrangements were made with me for this examination by the representatives of the Thames and Mersey Marine Insurance Company, Limited. I have practically never thought of it excepting yesterday and the day in question in April.

Cross-interrogatory No. 21: If you now testify differently from the said protest, who suggested such change in your testimony, and when was such suggestion made?

Answer: I do not testify differently, bar explaining one clause that I think is not very fully explained.

Cross-interrogatory No. 22: Were not the following statements made in your protest:

"1908.

May 30th: This vessel sailed from London with a cargo of creosote in iron drums bound for Eagle Harbor.

Nothing to be noted here occurred until

June 6th: When it was discovered that the carpenter's sounding rod was very *slight* colored with creosote.

July 11th: The crew were employed placing extra chocks amongst the cargo.

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July 29th: The gale continued as before; likewise the sea. The vessel again rolled heavily and pitched badly. Later the squalls blew with hurricane force. The ship rolled and pitched badly in a high confused sea and much water was shipped on deck. Towards night it was discovered that the cargo in the hold had commenced to work. The crew entered the hold from the lazarette and secured it as well as possible.

July 30th: The gale still continued. The ship rolled and pitched heavily and took much water on deck fore and aft. The cargo worked as before and the crew again entered the hold to secure it.

July 31st: The gale moderated the first part of the day but increased again later. Much water was shipped on deck. The cargo worked as before and the crew entered the hold through the ventilator hatch and secured it as well as possible. [150]

Aug. 1st: A fresh gale was experienced and the ship rolled and pitched heavily in a high beam sea. Again the cargo worked.

Aug. 7th: The crew were employed securing the cargo.

Aug. 25th: A hard gale was encountered accompanied by a heavy sea. Much water

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was shipped on deck. The cargo worked again badly.

Aug. 26th: Similar conditions were experienced.

Aug. 31st: A moderate gale was experienced. The decks were frequently awash and the cabin and deck-houses were flooded. The cargo worked heavily.

Sept. 1st: A moderate gale with hard squalls was experienced. The vessel shipped large quantities of water over all. The cargo worked heavily.

Sept. 2nd: Similar conditions were encountered.

Sept. 4th: A strong gale was experienced accompanied by a high sea in which the vessel labored and strained badly. The cargo worked as before. The hold was entered through the main ventilator and the drums were found to be adrift and were rolling about in all directions. It was impossible to secure the cargo until the weather moderated.

Sept. 14th: The crew were employed cutting up spare spars and blocking off the cargo with them.

Sept. 28th: It was noticed by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote.

Nov. 3rd: Similar conditions were encountered and the cargo again worked badly.

Nov. 17th: Stevedores commenced to discharge the

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cargo and they discharged 136 drums."

Answer: Yes.

Cross-interrogatory No. 23: Is it not a fact that you had extremely severe weather on the said voyage from London to Eagle Harbor?

Answer: We had extremely severe weather but we had no worse weather than is quite usual off Cape Horn or off Cape Flattery, Washington; we expect bad weather off both places. Flattery is not a nice place in the winter time.

Cross-interrogatory No. 24: Is it not a fact that the cargo of drums worked on said voyage, and that some of said drums were damaged?

Answer: That is a fact. **[151]**

Cross-interrogatory No. 25: In giving your testimony as to the number of the damaged drums of the said cargo, did you not mean such drums as were so damaged as to be a detriment to the contents?

Answer: The drums were not damaged to the detriment of the contents because the contents ran into the limbers of the ship and were afterwards pumped out into barrels as per my previous answer.

Cross-interrogatory No. 26: Did not some of the creosote of said cargo escape into the hold of said vessel, because of the very severe weather encountered on the said voyage?

Answer: The creosote escaped into the hold of the vessel partly on account of the severe weather

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and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out.

Cross-interrogatory No. 27: Was not some of said cargo of creosote lost because of such severe weather?

Answer: None was lost; it remained in the ship.

Cross-interrogatory No. 28: Was not said bark "Sardhana" in your opinion, seaworthy and properly manned, equipped and provisioned in all respects, when she left London on said voyage, for the said voyage?

Answer: She was.

Cross-interrogatory No. 29: Was not said cargo, in your opinion, then properly stowed for the voyage you were then about to make?

Answer: It was properly stowed.

Cross-interrogatory No. 30: Was not all damage to and loss of drums and/or creosote of said cargo, except the loss from the barge or lighter in the bay at Eagle Harbor, due to the severe weather encountered on said voyage?

Answer: There was no loss of drums or creosote; the damage done to the drums was partly on account of the severe weather and partly [152] on account of the original weakness of the drums. The leakage of creosote was to some extent due to the screw bungs working out as well as to the weakness of the drums and the severe weather.

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Cross-interrogatory No. 31: Was not all of said cargo in apparent good order and condition when received on said ship?

Answer: It was.

(Signed) GEORGE HENRY WYLIE,
Witness. [153]

[Exhibit G. H. W. No. 2.]

Bk. Sardhana,
Dunkirk, April 19th, 1911.

Messrs. Andrew Weir & Co.,
6 Lloyds Avenue,
London.

Dear Sirs:

In reply to your verbal inquiries I beg to give the following details with regard to the fire on the Sardhana at Eagle Harbor, Puget Sound, Nov. 18th, 1908.

I was in command of the vessel at the time and on board when the fire occurred, my mate Mr. Wylie was on shore but arrived very shortly afterwards and is fully acquainted with all the conditions and with the facts. The fire was from first to last of a very trivial nature though of course, with an inflammable cargo like creosote there were possibilities of a serious extension. Fortunately, the fire was extinguished in about three minutes by some six buckets of water being thrown down. The damage to the ship was confined to a one inch sliding door of the wooden bulkhead separating the Lazarette from the Hold, and which for about four feet in height and two feet five inches in width was licked by the flames,

scorching the paint, and to a very slight extent here and there a little more than scorched or slightly charred the wood, there was no real damage to the bulkhead consequently no survey was held and no repairs of any kind have been done to the door, which remains at the present time precisely as it was after the fire in November, 1908. The entry in the Log-Book referring to the fire being extinguished with considerable difficulty, meant that owing to the position of the fire, it having to be approached through the Lazerette which was full of stores, all the floor space being occupied, and therefore difficult to pass, and still more so in a hurry, and to the smoke, it was not easy to get at it, but when this [155] was done the fire was promptly put out. The chemical fire-extinguishers were used as a further measure of precaution; the crew of a neighboring ship quite close came on board to render assistance, but all danger was over before they arrived, the fire was so very trifling that I have attached little or no importance to it. The stores were damaged by water and chemicals and a few pieces of dunnage wood were scorched like the door, they were not badly burnt.

The Protest was extended at the request of and at the expense of the Pacific Creosoting Coy. There was no claim for salvage of any kind.

I shall be prepared to give evidence if required in confirmation of what I have stated above.

I am, Dear sirs,

Yours very truly,

ALEXANDER WALLACE,

Mate Bk. "Sardhana."

I concur in the above statement:

GEORGE H. WYLIE,
Mate Bk. "Sardhana."

P. S. Since writing the above, my attention has been called to the following points. It is absolutely incorrect to state that damage was caused by the fire to other parts of the vessel than the bulkhead door, nor was a considerable part of the dunnage burnt, but only a very few pieces of loose wood scorched or slightly charred.

As regards the origin of the fire, I have good reason to believe it to be as follows: The vessel has one clear hold, but with 'tween-deck beams about 7 feet below the main deck, on the beams are laid, round the sides, a deck of 4 or 5 feet wide on which cargo was stowed. The lazerette is entered through a hatch in the [156] Master's cabin and communicates with the hold by a sliding door made of one inch boards, in the wooden bulkhead and opens on the 'tween-deck. When the drums of creosote shifted at sea, the hold was entered through the sliding door and the drums chocked off, and the door remained open afterwards, it being jammed by the creosote drums. It is believed that some one or more of the crew on the 18th of November got down in the main hatch and over the cargo to the open door of the Lazerette with the intention of stealing stores from the Lazerette, but dropping a match on some burlap which had got into the hold from the Lazerette when chocking of the cargo, set fire to the burlap which is very inflammable, flares up quickly and gives off thick smoke, pieces of partially burnt bur-

lap were found where the fire occurred. Of course, if any part of the creosote had caught fire, the conflagration would have been very serious, and probably could not have been extinguished. The accounts of the fire in the newspapers at the time were absurdly exaggerated.

I am simply astounded to hear that it is claimed there was a loss of 56,264 gallons of creosote through leakage. The creosote when it leaked out of the drums was not lost or pumped overboard, but remained in the hold where there was no water or anything to damage the creosote. On arrival at Eagle Harbour, there were 13 inches of loose creosote in the limbers and this was pumped by the ship's pumps down to 3 or 4 inches into barrels provided by the Pacific Creosoting Company and so far as I know, was not damaged at all. The remainder of the loose creosote was baled into barrels and only a very small quantity was mopped up or put overboard. The loss must have been infinitesimal. I do not know what the ordinary leakage on creosote on a long voyage would be; at the time of the fire we had discharged 427 drums some of which were no doubt slightly damaged. The drums themselves, if undamaged, would have been bought by the Standard Oil Co'y as usual, for exporting [157] oil, but those that were dented were not of use to the Oil Co'y. It might be useful to ascertain from the Custom House how many drums were tallied by their office as damaged, and on which duty was consequently not paid.

The drums were 4 feet long and 2′ 8″ Diameter,

and made of sheet iron and were not very strong and probably to same extent leaked in consequence of their original weakness. Some were rejected in London as obviously unfit.

Freight was collected by the agents, and so far as I know, was paid in full on the intake weight.

ALEXANDER WALLACE,

April 20th, 1911.

I concur in the above statement.

GEORGE H. WYLIE,
Mate.

"Exhibit G. H. W. 2." George Henry Wylie, Witness. Jno. Burke Hendry, Commissioner. [158]

[Testimony.]

[Title of Court and Cause.]

To the Honorable Judges of the Above-entitled Court:

On this 20th day of February, 1913, the libelant appeared by Mr. Lawrence Bogle, one of its proctors, and the respondent appeared by Mr. McClanahan, one of its proctors. Thereupon it was stipulated that the testimony of the parties be taken before me at this time, the same as if an order of reference had been regularly entered in said cause.

LIBELANT'S TESTIMONY.

Mr. BOGLE.—It is stipulated that the policy produced at this time is the original policy of insurance referred to in the libel. And I now offer it in evidence.

Paper marked Libelant's Exhibit "A," filed and returned herewith.

[Testimony of H. E. Stevens, for Libelant.]

H. E. STEVENS, a witness called on behalf of the libelant being duly sworn, testified as follows:

Q. (Mr. BOGLE.) What is your business?

A. Now general manager of the Pacific Creosoting Company.

Q. How long have you been engaged in that business? A. Since 1907. [172*—1†]

Q. Holding the same office?

A. No. Only since Mr. Rood's death last year. I have held various offices in the meantime.

Q. Where do you reside? A. Seattle.

Q. Were you connected with the Pacific Creosoting Company the libelant in this case, in November 1908? A. Yes, sir.

Q. In what capacity?

A. I guess I was bookkeeper or chief clerk, I don't just remember what it was, but at that time I was in the office.

Q. What office? A. In the general office.

Q. It is located where?

A. Located in the Bailey building at that time; now in the White building.

Q. Where is the plant of the Pacific Creosoting Company? A. At Eagle Harbor.

Q. Mr. Stevens, in your capacity as bookkeeper or chief clerk, did you have any knowledge of the pur-

*Page-number appearing at foot of page of certified Apostles.

†Original page-number appearing at top of page of Testimony as same appears in Certified Apostles.

(Testimony of H. E. Stevens.)

chasing of creosote for that plant in England, to be shipped to this country? A. Yes, sir.

Q. Did you have any knowledge, or anything to do with the purchasing of the creosote which was shipped to this country on the British bark "Sardhana" in November, 1908?

A. We handled the transaction in the office at that time.

Q. Do you remember how many drums of creosote were shipped aboard the "Sardhana" consigned to the *Pacific Creosoting* [173—2]

A. I think 2753.

Q. From whom was that creosote purchased?

A. I believe from the Blagden-Wah company.

Q. Where are they located?

A. They have a London office.

Q. Do you remember about what time it was shipped from England?

A. In the early part of May, 1908.

Q. Mr. Stevens, I hand you this document and ask you what it is.

A. That is the bill of lading for the "Sardhana" cargo, the original bill of lading.

Q. Covering the cargo aboard the "Sardhana"?

A. Covering the cargo aboard the "Sardhana."

Mr. BOGLE.—I offer it in evidence.

Paper marked Libelant's Exhibit "B," filed and returned herewith.

Q. This Libelant's Exhibit "B" is endorsed by—

A. By the seller.

Q. And forwarded to you?

(Testimony of H. E. Stevens.)

A. And forwarded to us with the drafts.

Q. Mr. Stevens, do you know what the cost of this creosote was?

A. I do not recollect just the dollars and cents, but I know approximately what it was.

Q. Approximately what was it?

A. The cost of the cargo, something over thirty thousand dollars, the entire cargo.

Q. Does that include the freight?

A. That includes the freight. **[174—3]**

Q. Insurance? A. Delivered here.

Q. I hand you a document, Mr. Stevens, and ask you what it is.

A. That is a copy of the Consular invoice; British Consular invoice.

Q. Does that show the cost of the shipment of creosote? A. That shows the cost of the cargo.

Q. Is that the amount that you paid for the cargo?

A. I think it is very close to it. I think it is exactly the amount. We can verify it by the vouchers.

Q. Have you the vouchers with you?

A. Yes, sir.

Q. I wish you would verify it, unless counsel will admit it.

Mr. McCLANAHAN.—What is the materiality?

Mr. BOGLE.—I want to prove the value of the creosote—what they paid for it.

Mr. McCLANAHAN.—All right.

A. Seven thousand seven hundred pounds—something over $35,000; a voucher for $24,000; another

(Testimony of H. E. Stevens.)

for $6,500 that would make $31,000. $508, $1750, $1175. Totaling up something like $36,000 or $37,000.

Q. In payment of this invoice?

A. In payment of this invoice and freight.

Mr. BOGLE.—If there is any dispute about that invoice, the cost of that, Mr. McClanahan, I will put in these vouchers.

I will offer in evidence this Consular invoice.

Mr. McCLANAHAN.—I object on the ground that it is hearsay; self-serving; incompetent and immaterial. And on the [175—4] further ground that it shows on its face to be a copy and has not been verified.

Q. Where is the original invoice?

A. Filed with the Custom-house here.

Paper marked Libelant's Exhibit "C," filed and returned herewith.

Mr. BOGLE.—Because of your last objection I will ask leave to withdraw this exhibit "C" and have it certified by the proper Custom-house officer.

Mr. McCLANAHAN.—I would like to have you do that. That would obviate a portion of my objections. But my objections will stand to the certified copy when it is produced with the exception that my objection as to it not being certified will be eliminated.

Q. Mr. Stevens, referring to exhibit "C," state exactly what that is.

A. That is a copy of the Consular invoice made before the American Consular office in London, sent to

(Testimony of H. E. Stevens.)
us with the goods, to turn over to the Custom-house here before the delivery of the goods are received, so that they may segregate, or charge duty on any particular item that is dutiable.

Q. How are the figures arrived at there, as the cost of drums, creosote, etc., who furnished these figures, if you know?

A. I do not know. The cost of drums is evidently what they pay for them over there. They buy the drums and simply put the receipt in there.

Mr. McCLANAHAN.—I object to that as simply an opinion. Unless you know, Mr. Stevens, do not offer your opinion. **[176—5]**

A. I do not know.

Q. Mr. Stevens, did you, or your company, pay for this creosote, upon the figures shown in this Consular invoice?

Mr. McCLANAHAN.—I object as immaterial.

A. Yes, sir.

Q. I hand you this document, Mr. Stevens, and ask you what that is.

A. A part of the cost of the creosote.

Q. That shows a payment of that amount by you on this shipment of creosote?

A. That is a part payment.

Mr. BOGLE.—I offer this paper in evidence.

Mr. McCLANAHAN.—I object as incompetent, irrelevant and immaterial; not the best evidence. And on the further ground that it contains statements which are not properly a part of the cost of said creosote material to this case.

(Testimony of H. E. Stevens.)

Paper marked Libelant's Exhibit "D," filed and returned herewith.

Q. Mr. Stevens, I hand you vouchers number 7857, 7785, 7790 and 8092, and ask you what these vouchers cover.

A. Cover payment of freight of the "Sardhana" cargo.

Q. Does that cover the payment of all the freight?

A. Yes, sir.

Q. Was any portion of this freight advanced before the cargo was shipped? A. One half of it.

Q. Does this cover all the freight or the balance of it? A. This covers all the freight.

Mr. BOGLE.—I offer these vouchers in evidence.

[177—6]

Papers marked Libelant's Exhibits "E," "E1," "E2" and "E3," filed and returned herewith.

Q. Examine voucher 7082 and state what that is.

A. Part of the cost of the freight on the cargo of creosote.

Mr. BOGLE.—I offer that in evidence.

Paper marked Libelant's Exhibit "F," filed and returned herewith.

Q. Mr. Stevens, Exhibits "D," "E" and "F" cover the entire amount paid by you for this shipment of creosote? A. That covers all; yes.

Q. Are there any items in these vouchers which are not shown upon the Consular invoice which has been introduced as exhibit "C"?

A. Yes, sir.

Q. I wish you would point out the items there

(Testimony of H. E. Stevens.)

which are not included in that invoice?

A. Interest on drafts while in transit, and commission charged in London, and banks commission, a quarter of one per cent on the draft.

Q. Then the balance of the payments on the vouchers is the price paid by you for the cresote, Mr. Stevens?

A. Yes, there is interest on this voucher 7082, exchange of a quarter of one per cent, bank interest.

Q. That is not included in the Consular invoice?

A. No, sir.

Q. With the exception of these items, the balance of the vouchers show what you paid for this creosote. A. Yes, sir.

Q. State if you know when the freight was paid upon this [178—7] shipment of creosote.

A. One-half of it was paid in London; the other half paid at several times while the cargo was being discharged here.

Q. Mr. Stevens, state if you know whether any claim was made against the ship for shortage, short delivery of this shipment.

A. We protested against payment of freight but the charter party was made out and the number of drums being delivered, that we were to pay on the number of drums delivered. We were compelled to pay the freight.

Q. Who were the agents of the owners?

A. Frank Waterhouse & Company, Seattle.

Q. Mr. Stevens, I hand you these bills, and ask you to state what they cover.

(Testimony of H. E. Stevens.)

A. Bill of Henry Finch of $1012 is for recovery of drums of creosote in the bottom of the bay.

Mr. BOGLE.—I offer that bill in evidence.

Paper marked Libelant's Exhibit "G," filed and returned herewith.

Q. State if you know the circumstances in connection with that bill. Why was it necessary to employ this expense to recover these drums of creosote?

A. A scow while alongside the ship capsized and the drums sank?

Q. Do you know, of your own knowledge, how many drums were thrown off the scow into the bay?

A. No, sir.

Q. Do you know how many drums were recovered by Mr. Finch? A. 253. **[179—8]**

Q. Do you know who employed Mr. Finch to do this work? A. I think Mr. H. R. Rood did.

Q. Do you know whether survey was called and made after the capsizing of this scow, and if so, who made the survey?

A. Frank Walker made the survey.

Mr. McCLANAHAN.—Let me interrupt you right here. We had some sort of an understanding about that Finch bill. Let us have it clear. I do not object to it now, because of that understanding.

Mr. BOGLE.—That is what I do not know just exactly what our understanding was about it. What we wanted to arrive at was the number of drums which were capsized from this scow, and the number of drums recovered by Finch, and that the amount paid him was a reasonable amount for the work done.

(Testimony of H. E. Stevens.)

Mr. McCLANAHAN.—I will agree to all that. It is a little broader than the statement yesterday. This is simply to obviate the calling of Mr. Finch, as I understand it.

Mr. BOGLE.—Yes.

Q. What do the balance of these bills cover?

A. A bill of the Pacific Creosoting Company for launch hire, $36.75.

Q. In connection with what was that?

A. Raising these drums up and getting them off the bottom during the diving operations.

Q. It was in connection and in conjunction with the Finch work? A. Yes, sir.

Q. What amount was paid? [180—9]

A. Yes. A bill of $64.20, Pacific Creosote Company, was for the same service in connection with that, launch hire and labor. The next bill of the Crosby Towboat Company, towing and rent of scow and towing it over to Eagle Harbor, in that connection.

Q. For what purpose?

A. In connection with getting the drums off the bottom; it was while they were working on the bottom. Bill of Frank Walker, survey report, $75.

Q. That was surveying the scow?

A. Surveyor's report on the cargo.

Q. Which portion of the cargo, Mr. Stevens?

A. This does not say. Entire cargo on the bill. There is a survey report for the scow, $25. The bill of Johnson-Higgins, extending protest and for professional services, $60.

(Testimony of H. E. Stevens.)

Q. These bills have all been paid, have they?

A. Yes, sir.

Mr. BOGLE.—I offer these bills in evidence.

Mr. McCLANAHAN.—I object as incompetent, immaterial and hearsay. It is a self-serving statement, and containing items for which the respondent is not responsible.

Paper marked Libelant's Exhibit "H," filed and returned herewith.

Cross-examination.

Q. (Mr. McCLANAHAN.)—I refer you, Mr. Stevens, to the bill of the Crosby Towboat Company, being part of exhibit "H," and ask you if you know anything about that bill other than that it was paid by the Pacific Creosoting Company. Please [181—10] examine it.

A. Other than that the services were performed. The services were performed and the bill paid.

Q. You know the bill was paid and the services were performed? A. Yes, sir.

Q. What was that service?

A. They had to have a scow and take the drums as they were brought off the bottom, and have the tug take it over. And they had to have a tug take it over from here.

Q. To take the scow over to the scene of the accident? A. Yes.

Q. I refer to the bill in the same connection, of Mr. Frank Walker, for $25. I will ask you if you know anything about that bill, other than the fact that it was paid.

(Testimony of H. E. Stevens.)

A. It was for services on the scow that capsized.

Q. You know that, do you? A. Yes, sir.

Q. Do you know what work was done?

A. Yes, sir.

Q. How do you know it?

A. We have his report.

Q. That is all you know of it?

A. I have seen him over there.

Q. Did you see him working on the scow?

A. I saw him around it.

Q. Surveying it? A. Surveying it.

Q. Where was the scow when it was being surveyed? A. Eagle Harbor. [182—11]

Q. Whereabouts?

A. West of our dock; in our boom ground, loading ground.

Q. Was it in the water, or out of the water?

A. In the water.

Q. When Walker was surveying it?

A. Yes, sir.

Q. Was it still capsized or righted?

A. I cannot recollect now. I think it was righted.

Q. Did you go on the scow at that time?

A. I was on the scow. I was not there with Walker. I was on the scow after, or about the time it was—

Q. Being surveyed. You were at the scow on or about the time it was surveyed? A. Yes, sir.

Q. It was then righted? A. When I was on it.

Q. When you say "about the time," do you mean the same day?

(Testimony of H. E. Stevens.)

A. No, a few days; the next day, or shortly after that time.

Q. What I asked first was, whether you saw Mr. Walker making his examination of the scow.

A. Yes, I did.

Q. And then it was in the water?

A. It was in the water.

Q. And it was righted? A. Yes, sir.

Q. Did he make more than one examination, to your knowledge? A. Not to my knowledge.

Q. And this is the bill for the only examination that he made? A. Yes. [183—12]

Q. What did this examination consist of?

A. Seeing the condition of the scow.

Q. By what means—looking at it?

A. Well, getting down below, and looking at everything.

Q. Walked along the deck of the scow, did he?

A. I cannot say as to that.

Q. How large was that scow, approximately?

A. Oh, I suppose it must have been in the neighborhood of 28 or 30 by 80 or 90 feet long.

Q. That was the scow that you say the drums were on that capsized into the bay?

A. That capsized into the bay.

Q. Did you speak advisedly when you said the scow was capsized?

A. What do you mean by capsized? Do you mean clear up-side down?

Q. Turned right over.

(Testimony of H. E. Stevens.)

A. No, sir; I did not. It went over and the stuff slid right off.

Q. The scow was not capsized?

A. Not at the time I seen it.

Q. No, but at the time of the accident, did it capsize? A. I cannot say, I was not there.

Q. Have you seen the libel in this case, Mr. Stevens?

A. I cannot say. I would have to see the original.

Q. If this libel was signed in August, 1910, what was your position then?

A. Secretary of the company then.

Q. You then had knowledge of this libel, didn't you? A. Indirectly, yes. [184—13]

Q. Do you know where the company got its information that this lighter containing the creosote drums capsized?

A. From the superintendent and employees in charge at the works.

Q. That is where the information came from?

A. Yes, sir.

Q. The libel states that the lighter itself capsized. That information was correct, was it, when you received it? A. Yes, sir.

Q. How it capsized you do not know? A. No.

Q. Are you the same gentleman who answered the interrogatories filed with the answer in this case?

A. I think not. I do not think I have been on before. I do not recollect.

Q. Your name is H. E. Stevens?

A. Yes, sir. If I seen them I could tell you.

(Testimony of H. E. Stevens.)

Q. If you please, look over the interrogatories referred to and the answers thereto, filed by your company, and see if you can recognize now whether you are the man that answered these interrogatories?

A. Yes, sir.

Q. You are the man, are you?

A. Yes, sir. I am.

Q. You knew about this case somewhat, didn't you? A. Yes, sir; somewhat.

Q. Will you be the only officer of the company that will be examined as a witness, present officer?

A. Yes, sir.

Q. Where, Mr. Stevens, did you get your information on which [185—14] the answers to the interrogatories was made?

Mr. BOGLE.—I object. Mr. Stevens does not know what officers we may call to be examined.

A. From reports made by our employees at the works.

Q. From who did you get your information that the various ceilings of the ship near the bulkhead had been burned?

A. From Mr. Beal and Mr. Walker.

Q. Give the initials of Mr. Beal. A. F. D. Beal.

Q. Who was he? A. Superintendent.

Q. Who is Mr. Walker? A. Marine surveyor.

Q. You got your information from these two men?

A. Yes, and possibly others. I do not recollect now.

Q. You recollect these two.

A. Yes. They were in charge. They were the

ones. Beal is the man who would naturally give the information.

Q. Where did you get the information that about two-thirds of the bulkhead was burned and charred?

A. From the same sources.

Q. These two gentlemen. Where did you get the information contained in your answer to the sixth interrogatory to the effect that the damage on that ship caused by the fire was such as to require repairs?

A. From the same sources that I got all of it.

Q. Where did you get your information that formed the basis of the answer to the same sixth interrogatory that the repairs consisted in the removal of the burned bulkhead and replacing with a new one? [186—15] A. The same source.

Q. Where did you get your information in answer to the eighth interrogatory that the lumber on the "Sardhana" which was burned was saturated with creosote? A. The same sources.

Q. In fact all your information was hearsay?

A. Yes, sir.

Q. And came from the gentlemen that you have named? A. Yes, sir.

Q. Do you know whether either Mr. Beals or Mr. Walker were present at the fire? A. I do not.

Q. While the "Sardhana" was discharging at Eagle Harbor, did you have anything to do with the discharging? A. No, sir.

Q. I thought when you were examined on your direct examination that you said that you had the handling of the "Sardhana's" cargo?

(Testimony of H. E. Stevens.)

A. Simply paying the bills. I had nothing to do with the actual work over there; simply paid the bills.

Q. Have you any stock books, I do not mean stock certificates books, but stock books belonging to the Pacific Creosoting Company, that would show the amount of creosote taken from the "Sardhana"?

A. I do not know whether they can be found or not. They were in existence, but I do not know whether they can be located. They are books that we have been keeping at the works. There have been two or three changes of operating forces since that time.

Q. Well was there not a transcript made from these books to [187—16] some permanent books of the company? A. Nothing of that kind.

Q. How do you take stock then, at the end of the year?

A. We take actual stock at the end of the year.

Q. That includes all your stock. But you have no books now that would show the amount of the creosote received from the "Sardhana"?

A. Nothing on the books.

Q. Do you know anything about that?

A. Well, I know about the receipt of the cargo, yes.

Q. Do you know anything about the receipt of the drums of creosote? A. Yes.

Q. How do you know that?

A. We got a ship in there. We know she is discharging. We get a report of the discharge, the number of barrels she discharges and the quantities

(Testimony of H. E. Stevens.)

that are in the drums.

Q. You make a record of that? A. Yes, sir.

Q. Where is that record?

A. We have it here, Mr. Bogle has it.

Mr. BOGLE.—I have one record here.

Q. That would be the record of the receipt by you of creosote by you from the ship? A. Yes, sir.

Q. Produce it if you have it.

Mr. BOGLE.—I produce it under protest, because it is not proper cross-examination of this witness. I did not go into that on direct examination.

Mr. McCLANAHAN.—I do this because of the witness' statement [188—17] that he would be the only officer of the company that I would have an opportunity of examining.

(Paper handed to Mr. McClanahan.)

Q. You have handed me, through your counsel, a letter signed by F. D. Beale, dated Eagle Harbor, December 26, 1908, and addressed to the Pacific Creosoting company as being the data which I called for. Is that correct? A. Yes, sir.

Mr. McCLANAHAN.—I offer the letter in evidence.

Paper marked Respondent's Exhibit 1, filed and returned herewith.

Q. Was there any doubt at the time of the receipt of this letter as to the amount of creosote which had been received in this cargo?

A. The exact quantity, yes; the exact number of gallons.

Q. Was that uncertain quantity ever cleared up?

(Testimony of H. E. Stevens.)

A. Yes, sir.

Q. Where is the result of that clearing up?

(Witness hands counsel paper.)

Q. You are referring now to another paper, a yellow sheet of paper, dated March 8th, 1909?

A. Yes, sir.

Mr. McCLANAHAN.—I offer this paper in evidence.

Paper marked Respondent's Exhibit 2, filed and returned herewith.

Q. This last sheet introduced in evidence purports, does it not, Mr. Stevens, to be the result of measuring the creosote left in the damaged drums of the "Sardhana," and nothing more?

A. That is all. [189—18]

Q. Now, will you please answer my former question: Did you ever definitely ascertain the amount of creosote received from the "Sardhana"?

A. We ascertained it by taking the full quantity which should have been shipped and deducting the difference between what was in these damaged drums —what should be in the damaged drums and what was originally in the damaged drums.

Q. That is how you ascertained the amount of the cargo. I am referring specifically to the damaged drums now. You ascertained the amount of creosote lost by deducting the amount which you measured from the damaged drums, from the amount which should have been in the drums if they had been full?

Mr. BOGLE.—The witness testified that he had nothing whatever to do with the measuring of this

(Testimony of H. E. Stevens.)

creosote or examination of the drums. The only information he has is the exhibits here which speak for themselves. How they were made out he does not know.

A. Yes, sir. I simply, as bookkeeper, entered them as the record.

Q. You do not know what was in originally the drums that became damaged. What was the original quantity or contents of the drums originally?

A. No, I don't know.

Q. So then your complete record of what was received from the "Sardhana" is made up of a compilation of the creosote understood to be in good drums that did not leak, plus that which was measured by you from the damaged drums?

Mr. BOGLE.—I renew my last objection. This witness had [190—19] nothing to do with the actual measuring of any creosote and was not present at the time.

Q. This exhibit 2 is from the files of your office?

A. Yes, sir.

Q. And was compiled by your own superintendent? A. Or some of the clerks in the office.

Q. And sanctioned by him at the time?

A. Yes, presumably so. He turned it in as a report.

Q. And as far as you know, as far as the records of your office show, the creosote received from the "Sardhana" by you is represented by exhibits 1 and 2? A. Yes, sir.

(Testimony of H. E. Stevens.)

Redirect Examination.

Q. (Mr. BOGLE.) Mr. Stevens, referring to Respondent's Exhibit 2, I will ask you if you have any knowledge of the items on there outside of the exhibits themselves? A. No, sir.

Q. Were you present at the time the creosote was measured? A. No, sir.

Q. Do you know whether any creosote was pumped out of the ship and included in this measurement?

A. No, sir.

Q. Or how the measurement was made?

A. I do not know how it was made.

Q. Do you know whether four drums which were lost from the scow capsized were included in this?

A. No.

Q. You have no information except as shown here?

A. No, sir. [191—20]

Q. Counsel asked you if this is the complete file of your office covering this matter of lost creosote, lost drums. In making your answer did you refer to your city office or to your office at the plant?

A. The city office.

Q. Do you know whether there is any other data at the plant of the Pacific Creosote company, at Eagle Harbor?

A. Not without making search, I do not know. It has been so long and so many papers taken out that I do not know whether it is there or not.

Q. Is it a fact that you are having a search made for it over there at your plant? A. Yes, sir.

Q. Is that the place where the data would be?

(Testimony of H. E. Stevens.)

A. That is where it would originate.

Q. This creosote was measured when, how many years ago?

A. 1908 or 1909. Latter part of 1908 and the first part of 1909.

Q. Mr. Beale was employed at that time in what capacity? A. Superintendent.

Q. He would have knowledge of these facts?

A. Yes, sir.

Q. Upon which counsel has examined you?

A. Yes, sir.

Mr. BOGLE.—I move to strike the cross-examination of the witness for the reason that it is not proper cross-examination.

(Testimony of witness closed.) **[192—21]**

Seattle, Washington, Feb. 21, 1913.

PRESENT: Mr. BOGLE, for the Libelant.
Mr. McCLANAHAN, for the Respondent.

[Testimony of Roy E. Douglas, for Libelant.]

ROY E. DOUGLAS, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Q. (Mr. BOGLE.) What is your business?

A. Salmon cannery.

Q. What was your business in the month of November, 1908?

A. Assistant superintendent of the Pacific Creosote Company.

Q. How long were you engaged in that capacity with the company?

(Testimony of Roy E. Douglas.)

A. In that capacity about two years and a half.

Q. You were assistant superintendent on the 18th of November, 1908? A. Yes, sir.

Q. Mr. Douglas, do you remember the incident of the fire aboard the "Sardhana" in November, 1908?

A. I do.

Q. About what way did this fire occur, and what called your attention to it?

A. As I recollect it occurred about 8:30 P. M. My attention was called by either the fire-alarm or cries of fire that apparently came from the British bark "Sardhana."

Q. Where were you, Mr. Douglas, when you heard this fire alarm?

A. We were attending a religious service at a private house.

Q. At the house of Mr. Hellman?

A. Yes, sir. **[193—22]**

Q. Where is the house situated with reference to the place where the "Sardhana" was anchored in the harbor?

A. Why, about 600 feet in a northern direction from the house, and moored to the dolphins.

Q. What did you do, Mr. Douglas, when you heard this fire-alarm?

A. I went to my house and changed my clothes.

Q. Where was your house with reference to the house of Mr. Hellman? A. Two doors.

Q. Then what did you do?

A. After changing my clothes I went out aboard the ship.

(Testimony of Roy E. Douglas.)

Q. How did you get aboard the ship, did you have to take a boat? A. No, I walked on the logs.

Q. Out to the ship?

A. Out to the ship.

Q. Was there any evidence of fire when you arrived aboard the ship. A. Yes, sir.

Q. Just what did you see of the fire aboard?

A. On arrival the sailors were passing water through the companionway and down through the captain's cabin and on in towards the fire. And considerable quantities of smoke were issuing from the companionway. After looking in the companionway and seeing that it was crowded, I merely remained out on deck.

Q. Mr. Douglas, how long did it take you from the time you heard the fire-alarm until you were aboard the "Sardhana"?

A. My recollection is that it was about 15 minutes that had **[194—23]** elapsed.

Q. Do you know when the fire was finally put out on board the "Sardhana"?

A. I should judge that the captain was satisfied the fire was out inside of fifty minutes after I heard the first alarm given.

Q. Mr. Douglas, were there any fire-extinguishers used in extinguishing this fire?

A. Yes, there were.

Q. Where were these fire-extinguishers secured?

A. They were secured on the docks of the creosote company.

Q. Mr. Douglas, were there any of the employees

(Testimony of Roy E. Douglas.)

of the creosote company, or crews of any other vessels lying in the harbor assisting in putting out this fire?

A. I have no recollection of the other crews, but a number of employees of the company assisted.

Q. Would you have recognized the crews from the other ships?

A. No, I would not have recognized them in the dark.

Q. Did you examine the location of the fire on the night of November 18th, the night that it occurred, did you go below?

A. I went only as far as the captain's cabin and accepted his explanation of the extent and the location of the fire that evening.

Q. Did you at any subsequent time see the location of the fire and the damage caused by it?

A. I did.

Q. What was the extent of the damage, Mr. Douglas?

A. Why, the extent of the damage, as I remember it, was very small. There was a sort of partition or [195—24] open framework separating the cargo from the lazarett, and the lumber of which this partition was constructed was charred quite heavily at the bottom, but only blackened at the top.

Q. What was the height of that partition?

A. As I recollect it, it was about five feet.

Q. What was the extent of the burning across the ship?

A. It was rather dark in that lazarette and I ex-

(Testimony of Roy E. Douglas.)

amined the thing none too closely, but as I remember it, the fire extended athwartships probably eight or ten feet, but it is possible that it ran further, because I did not crawl over that way to see.

Q. What was the extent of the fire in height, how far did it burn up this partition.

A. Actually burned, as I remember it, about three feet; above that it was merely blackened by the heavy smoke that arose.

Q. Was this entire area of about 8 or 10 feet by about three feet burned to about the same extent?

A. No, it was higher in places and lower in others, as a small fire would run higher in one place than another.

Cross-examination.

Q. (Mr. McCLANAHAN.) Did you see the door of the bulkhead that is in the courthouse?

A. I did not.

Q. Do you know that it was here?

A. I learned it about an hour ago.

Q. (Mr. BOGLE.) You arrived home this morning, didn't you? **[196—25]**

A. Yes, sir, just arrived at 9 o'clock this morning.

(Testimony of witness closed.) **[197—26]**

[Testimony of Frank Walker, for Libelant.]

FRANK WALKER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) State your name, occupation and residence, Mr. Walker.

A. Frank Walker. Marine surveyor; naval architect. Residing at Seattle.

(Testimony of Frank Walker.)

Q. How long have you been engaged in that business, Mr. Walker? A. About fifteen years.

Q. How long have you been engaged in that business in the city of Seattle?

A. About that length of time. I cannot say exactly.

Q. Mr. Walker, did you on or about the 17th day of November, 1908, and prior thereto and subsequent dates, make survey of the cargo over at Eagle Harbor which was at that time being unloaded from the British bark "Sardhana"?

A. Yes, I attended the discharging of the ship.

Q. I hand you this paper, Mr. Walker, and ask you if that is your report of that survey.

A. Yes, that is one of my reports of the survey of that cargo.

Q. Did you make more than one survey on the cargo to ascertain the damage to the cargo and the loss of creosote?

A. Well, I attended that at various dates, and I think this runs from November 17th to December 28th.

Q. Does that report of survey cover the entire damage to and loss of drums?

A. Yes, this covers all the cargo that was discharged from the ship, the number of gallons discharged, and number [198—27] of gallons supposed to be there.

Mr. BOGLE.—I offer this paper in evidence.

Paper marked Libelant's Exhibit "I," filed and returned herewith.

(Testimony of Frank Walker.)

Q. Mr. Walker, the recitals on the first page of that—where did you obtain that information?

A. I obtained it from the vessel's log.

Q. Ship's log? A. Ship's log.

Q. Mr. Walker, I wish you would explain how you arrived at the figures on page 2, showing the number of drums that were damaged and lost.

A. I arrived at the number of drums by actual tally.

Q. How was that tally taken, Mr. Walker, how did you segregate the damaged?

A. Well, as the drums came out of the vessel the good ones were placed in one pile and the damaged drums were placed in another pile.

Q. Did you afterwards inspect the damaged drums? A. I went over every drum.

Q. How many damaged drums were there?

A. Just as this survey says. I have no other recollection than the survey.

Q. That survey was taken from your actual observation and count? A. There was 741 damaged.

Q. That is from your actual count?

A. Yes, from my actual count.

Q. What was the extent of the damage, Mr. Walker. Was the market value of the drums injured or destroyed? **[199—28]**

A. The drums were useless. They were stove in and bulged and dented and leaking; 25 of them were entirely empty.

Q. Explain how you arrived at the number of gallons of creosote which were lost.

(Testimony of Frank Walker.)

A. The way we arrived at the loss, we took the invoice number of drums and what each should have contained.

Q. That gave the total number of gallons.

A. Yes, that should have been there. And as the drums were emptied into a tank, an empty tank, and as the drums were emptied the amount was shown by the meter reading.

Q. Were these readings taken under your supervision? A. Yes, sir.

Q. Do you know whether they were correct?

A. I am satisfied they were correct when I made that survey.

Q. Do you know whether any lost creosote was pumped out of the hold of the ship?

A. There was a small quantity pumped out and dumped into this empty tank.

Q. Do you know in what condition that creosote was?

A. It was dirty. It had been among the ballast.

Q. Have you any idea now, at this time, approximately how many gallons were pumped out of the hold?

A. I could not tell you exactly; three or four thousand gallons.

Q. This report shows a loss here of 56,267.2 gallons. Have you any knowledge as to how that loss occurred?

A. Well, I know that the creosote was not there. That the drums were leaky, and in my investigation I understood it was pumped overboard at sea. [200—29]

(Testimony of Frank Walker.)

Q. Would that be an ordinary precaution, if there was any great amount of creosote in the hold in rough weather?

A. Any great amount loose liquid in the hold of a ship in rough weather would be a damage to the vessel.

Q. This report of survey showing loss of creosote and damaged drums, does not show the loss which occurred by the capsizing of the scow?

A. I made a separate report on that.

Q. I hand you this paper, Mr. Walker, and ask you if that is your report.

A. Yes, that is my report on that.

Q. The report shows the number of drums on the scow at the time it capsized?

A. Yes, and shows a report of the number recovered by the divers.

Q. And the number lost.

A. 34 lost; 15 light ones picked up floating, these were secured, partly empty ones.

Mr. BOGLE.—I offer this survey report in evidence.

Paper marked Libelant's Exhibit "J," filed and returned herewith.

Q. Mr. Walker, what was the condition of this scow at the time you made this examination and survey?

A. I think it says in there that she was bottom up.

Q. Did you examine to see whether she had made any water or leaked?

(Testimony of Frank Walker.)

A. I cannot say; I cannot remember. (Examines Exhibit "J.") She was tight. There was nothing the matter with the barge. I examined her afterwards.

Q. She could get no water in her? [201—30]

A. No, she was not leaking.

Q. When did you examine her, how long after she capsized?

A. I cannot say. I cannot remember exactly. When I examined the barge she was righted up on the gridiron.

Q. Mr. Walker, do you remember making a survey of the "Sardhana" to ascertain the extent of the fire which occurred on board of her on November 18, 1908? A. I do.

Q. I hand you this report of survey and ask you if that is your report made from that examination?

A. Yes, sir, that is my report on that.

Q. Do you remember when you made that examination, Mr. Walker?

A. I made that examination on the 20th day of November.

Q. This report was made from personal investigation and inspection of the fire as to the amount of damage?

A. Yes, sir. The report distinctly states what I found and the exact date of it.

Q. Mr. Walker, do you remember now the extent of the burning of the bulkhead and the door?

A. I remember that the bulkhead was considerably charred more or less all along the forward part

(Testimony of Frank Walker.)
of it, including the door.

Q. What was the width of the bulkhead?

A. Ran right across the ship.

Q. Do you have any idea how far it was across the ship?

A. I do not know. The beam of the ship probably forty feet. Entirely across the aft between-decks.

Q. It was burned more or less all the way across?

A. Yes, more or less all the way across—no, not all the [202—31] way across, about the center of the bulkhead, and I would say there was some 25 feet charred and burned.

Q. Was the nature of the burning about the same all along?

A. Yes. It varied; it went up and down. Varied on the bulkhead, but distinctly showed the fire, it was charred.

Q. Was there any cargo or stores in the immediate vicinity of this fire?

A. Yes, creosote drums in the immediate vicinity, forward of it.

Q. Was there any dunnage?

A. Yes, dunnage where the fire originated in the dunnage lying at the bottom of the bulkhead on the between-decks.

Q. Was this the dunnage that had been used in stowing the creosote?

A. Yes, there was more or less of it.

Q. Was there any burning or charring of the ceiling of the vessel?

(Testimony of Frank Walker.)

A. Let me see my report. (Examines report.) There was none to the ceiling of the vessel. She had no ceiling. She had battens on her sides. On the between-decks there was no ceiling.

Q. Was there any portion of the dunnage on fire burned?

A. Yes, there was a lot of the dunnage burned and charred.

Q. Was the flooring damaged to any extent?

A. You mean the deck?

Q. Yes.

A. No. There was quite a good deal of this dunnage had run up two or three feet high just where they had thrown the dunnage after removing some of the drums. That dunnage was all distributed across the forward part of [203—32] the bulkhead. The fire did not get down to the deck.

Cross-examination.

Q. (Mr. McCLANAHAN.) Mr. Walker, where did you obtain your information, other than that which have personal knowledge of, in regard to the fire? A. From the master of the vessel.

Q. Did you know at the time of the fire how the discharging of the drums had progressed?

A. Did I know at the time of the fire?

Q. Yes, how much had been discharged?

A. I cannot remember now.

Q. Who was it did the tallying of the drums as they were discharged?

A. I cannot tell you who they were now. They were tallymen employed by the Pacific Creosote

(Testimony of Frank Walker.)

Company, I believe.

Q. What was your particular employment at that time?

A. My employment was to watch that cargo as it was discharged from the vessel and report on the same what I found.

Q. Report on its condition?

A. On its condition and the quantity discharged and the condition of the drums as they came out.

Q. You do not now know how far the discharging had progressed at that time?

A. No, I do not remember.

Q. You do not know then whether the drums immediately forward of the bulkhead had been reached in the discharging or not?

A. Well, some of the drums had been taken out, but the [204—33] majority of the drums in the between-deck—

Q. I do not think you understand me. There were drums piled in front of the bulkhead?

A. Yes.

Q. Stood there. A. Yes, sir.

Q. In the between-decks? A. Yes, sir.

Q. You do not know whether these drums or any part of them had been discharged at the time of the fire?

A. I do not recollect. I know I went over the top of the drums to get to where the fire was.

Q. So that they had not been discharged?

A. No, sir.

Q. Then where did this dunnage come from that

(Testimony of Frank Walker.)

you say was thrown forward of the bulkhead?

A. I cannot tell you where the dunnage came from exactly, because the cargo had shifted at sea, and there was a lot of dunnage scattered all over. They had been restowing it at sea.

Q. How do you know that there was dunnage there? A. Because I saw it.

Q. Saw what, the remains of the dunnage?

A. The dunnage was not all burned up, yes.

Q. Did you see any charred dunnage?

A. Yes, sir.

Q. Was it loose? A. Yes, sir.

Q. Was there any charred dunnage in front of the bulkhead at the time?

A. There was dunnage at the forward side of the bulkhead more or less scattered all over. [205—34]

Q. Answer my question directly.

A. There would be some forward in the way of the door.

Q. You remember distinctly that there was charred dunnage in front of the bulkhead door?

A. No, I do not, immediately in front of it.

Q. Was there dunnage in the drums themselves?

A. Between the drums.

Q. In front of the bulkhead door. A. Yes, sir.

Q. You saw that, did you? A. Yes, sir.

Q. Was that charred? A. No, sir.

Q. How far was that dunnage and the ends of the drums from the bulkhead door?

A. Oh, I could not tell you; some little distance.

Q. Give us your best estimate.

(Testimony of Frank Walker.)

A. I could not tell you. Probably five or six feet.

Q. That is your best recollection.

A. Yes, I could not recollect.

Q. You might be mistaken about that?

A. I would not swear to the distance the drums were from the bulkhead.

Q. Might be 18 inches.

A. No, it might be more than that. You could walk between them.

Q. It might be two feet. A. More than that.

Q. Mr. Walker, was your report of survey on this fire assisted in any way by an examination of the ship's [206—35] log?

A. Not the fire report, not that I recollect. The master's statement. He had his log-book in the cabin, and had his entry in the log-book of the fire, I remember reading that.

Q. If there is a similarity between the language of the log and the language of your fire report, how do you account for that?

A. Because the master had a written report which he gave me to read.

Q. So, then, your report was assisted by some information that you received from the master?

A. Yes, regarding the origin of the fire and what took place.

Q. And the fire itself?

A. And the fire itself. I was not present when the fire was burning.

Q. So that your report then in part is assisted?

(Testimony of Frank Walker.)

A. It says exactly what it says.

Q. Assisted by some information that you received from the master, either written report or an examination of his log? A. Yes, sir.

Q. Now, is your testimony at all assisted by this report from the master?

A. No, I cannot say that my testimony is.

Q. Have you an independent recollection now of the fire, as you saw it, the effects of it?

A. I have an independent recollection after four or five years. [207—36]

Q. Is that a very strong opinion or memory?

A. I have a strong recollection after reading my reports on that of the fire, yes, I have a good recollection.

Q. Now, you have made a statement that that fire extended athwartships? A. Yes, sir.

Q. For some 25 feet.

A. I said maybe twenty feet.

Q. It might be less than that?

A. I did not measure it.

Q. Now, as a matter of fact, Mr. Walker, don't you remember that the bulkhead door was the seat of the fire?

A. No. I remember the bulkhead was burned in a similar manner to the door in numerous places.

Q. Numerous places? A. Yes, sir.

Q. How would you account for a fire that had that kind of an origin, what is your opinion?

A. I did not attempt to arrive at any.

Q. Well, it would indicate, from your testimony,

(Testimony of Frank Walker.)

would it not, that that fire had been set in several different places along the bulkhead?

A. I should not hazard an opinion on it. The fire was there, I was positive of that, and there was more of it than the door.

Q. And you think, as you remember it now—

A. It might have run along on inflammable material, you could not tell.

Q. There were several distinct sets of fire, original fire, as you remember? [208—37]

A. Not several distinct sets. I remember the fire went up and down as a fire will go.

Q. Do you know the character with reference to inflammability of saturated or dunnage saturated with creosote as to inflammability?

A. I have not gone deeply into that.

Q. Did you assist in the preparation of an extended protest for the master to sign?

A. Not that I am aware of.

Q. Did you assist in the preparation of any papers for the Pacific Creosote Company?

A. I have no recollection of that in any way at all.

Q. Did you at the request of the Pacific Creosote Company furnish them with any information?

A. I furnished the Pacific Creosote all the information contained in these reports. That is my business, I was employed by them to do it.

Q. Did they, as far as you know, receive from you the data upon which they formed their libel?

A. I know nothing about their libel at all. All the data they ever received that I have any recollection

(Testimony of Frank Walker.)

of is in these reports.

Q. In this case we propounded to the libelant certain questions which they have answered, and I would like to ask you, Mr. Walker, if you had anything to do with furnishing the data on which the answers were based in their libel. They say that the bulkhead together with the bulkhead door was burned. They further say that other parts of the ship were burned, and we asked them the question, what were these other parts of the [209—38] ship that had been burned. Did you furnish them the data for the answer to that?

A. All I recollect furnishing them is the reports I have given, that you have a copy of there. I talked them over with them, but I do not recollect furnishing any information.

Q. Their answer was that the floors and ceiling of the ship near said bulkhead were burned. Did you furnish them with that information?

A. No, not that I am aware of.

Q. Is that true, that the floors and ceilings were burned near the bulkhead?

A. There are no floors there. The report covers all there was of the fire.

Q. You mean by *saiding* there is no floor there *there is* the between-decks?

A. That is not a floor, that is a deck.

Q. That might be a floor to a man who is not versed in marine matters, and the underneath of the deck might be the ceiling, and that is evidently what the Pacific Creosote Company meant when it said

(Testimony of Frank Walker.)

that the ceiling and the floors were burned. That is not in accordance with the facts?

A. We speak of the ceiling down below.

Q. That is not in accordance with the fact, is it?

A. There was no deck burned.

Q. Now, we ask them another question. We ask them if the whole of the bulkhead forward of the lazarette was burned, and if it was not, how much of it was burned, and they reply that about two-thirds of it was burned [210—39] and charred. Did you furnish them with that information?

A. I cannot say. I may have done so.

Q. How high was the bulkhead?

A. The bulkhead ran from deck to deck.

Q. How high would that be?

A. I should say the deck was about seven feet six.

Q. Your estimate of the beam of the ship was forty feet? A. Not the beam of the ship—

Q. I do not mean the beam technically speaking, but the athwartship there.

A. The beam of the ship would be about forty feet forward and the ship would decrease going aft, but I could not say.

Q. Give your best estimate what the athwartships would be there.

A. That is easily obtained from Lloyd's Register. I cannot give you her beam. She is a small bark, if I remember right.

Q. Suppose I assume the beam of the ship was 35 feet, cannot you give an estimate of the width of that bulkhead?

(Testimony of Frank Walker.)

A. Estimating the beam of the ship at 35 feet, she would run in there to about 30 or 31 feet.

Q. Was it correct, then, for the Pacific Creosoting Company to say that two-thirds of this bulkhead, seven feet high by thirty feet wide was burned and charred?

A. Well, assuming that she is about thirty feet wide there, there would be about twenty feet of the bulkhead burned, that would be true.

Q. Was there 20 feet burned? [211—40]

A. I estimate that.

Q. That is your judgment? A. Yes, sir.

Q. Have you seen the door?

A. Not since it was in the ship when I examined it.

Q. You have not seen it since it was brought here?

A. No, sir. I have never seen the door since it was removed.

Q. You knew it was here? A. I heard it was.

Q. You have been in the city, have you, all the time?

A. Not all the time. My home is in the city.

Q. When did you first hear that the door was here?

A. That I could not say; a few days ago.

Q. Have you any objection to stating why you did not want to see it, did not see it?

A. I have never been asked to see it. I certainly am not going to take a trip to the courthouse just to pass the time.

Q. By the way, did you make a survey of this fire?

A. I was requested to make a survey as the survey report calls for.

(Testimony of Frank Walker.)

Q. There was no cargo burned?

A. Well, at that time I was informed that there had been a fire on the ship and they would like me to make a survey and report what the damage was. That is all I know about it.

Q. Something unusual, was it not?

A. No, not in that line of business.

Q. I mean the circumstances.

A. They did not know themselves whether there was any [212—41] cargo damaged, I don't suppose. Anything that happened at that time I was asked to report on.

Q. Now, going back to these questions again. We asked them whether the damage caused by the fire was such as needed repairing, such as required repairing, and their reply was that the damage was such as it required repairs, and that the repairs were made and consisted of removing the burned bulkhead and building a new one in its place. Did you furnish them with that information?

A. No, I had nothing to do with that.

Q. Do you know whether that is true or not?

A. No, the bulkhead was not renewed while the cargo was coming out of the ship. It was after I finished with the ship.

Q. Did they require renewing?

A. Oh, yes, it required renewing.

Q. Did you know that the ship was owned by Andrew Weir & Co.?

A. Oh, yes, I did, casually.

Q. Who was their surveyor, their personal sur-

(Testimony of Frank Walker.)

veyor here at the time?

A. I believe Captain Panton was their surveyor.

Q. Was there not Captain Baird?

A. No, he was their superintendent. I think Captain Panton was surveying the cargo for them.

Q. He surveyed the cargo?

A. I believe so. I know he was over there on some ships.

Q. He is dead now?

A. Yes. We used to go over together. [213—42]

Q. You saw nothing yourself of the fire?

A. Oh, no, I was not there until two days after.

Q. Did you make more than one examination?

A. I went over and examined the fire, made my notes and went back and made my report. I do not think I ever took any more notice of it.

Q. What do you mean by notes?

A. My notes that I made in my book, regarding the damage and entered it in the report.

Q. Where is that note-book?

A. Oh, Lord! That is in the files of the past.

Q. You did not keep them?

A. No, they are no use.

Q. It is a good practice to keep your note-books.

A. I keep some of them if there is any interest in them.

Q. I understand from your testimony that you *considered fire* quite an important fire?

A. I considered that the vessel had a very narrow escape.

Q. Because of the possibilities or the actualities?

(Testimony of Frank Walker.)

A. Because of the actualities.

Q. You think it was from your examination actually a material fire? Materially important?

A. There was the marks of a good fire.

Q. You are now touching on possibilities. Was there actually a good fire?

A. Yes, sir, there was a fire, a good fire there. Of course, if the creosote once got to going there would have been something doing.

Q. But in your judgment there was actually a material fire? [214—43]

A. There was actually a material fire there.

Q. What, in your opinion, was the value of the damage done there?

A. Oh, the value of the damage I should say was $150 to $200.

Q. This bulkhead was so damaged that you considered that it was proper and necessary that it should be removed and repaired?

A. If it had been mine I should have renewed it.

Q. For what purposes, for performing the duty for which it was originally intended?

A. The bulkhead was intended to divide off the lazarette from the cargo slips and from the stores; that is where all the ship's stores are.

Q. The repairs were necessary for that purpose?

A. Yes, sir.

Q. So that the fire had materially weakened and injured this partition?

A. Yes, sir, it certainly had.

Q. You have in your experience since then been

(Testimony of Frank Walker.)

pretty busy haven't you, making surveys of ships?

A. Yes, busy all the time, practically speaking.

Q. You are not very zealous to retain these little matters of detail in your mind for any considerable time, are you?

A. No, after I report on matters, as a rule they pass from my sight.

Q. You rely on your reports to refresh your memory?

A. Yes, sir, otherwise I would get them mixed.

Q. So that your reports, where they contain information at first hand, are more apt to be reliable now than [215—44] your recollection?

A. Yes, the report is more apt to be reliable than my recollection.

Q. Now, I want to call your attention to your survey of the barge or lighter, that was capsized. Will you state when it was, after the capsizing of the barge, assuming that the capsizing of the barge was on the 21st of November, how long after that was it that you saw the barge yourself?

A. I stated in the report that I examined the barge, I examined the barge the same date.

Q. You examined the barge the same day it was capsized? A. She was bottom up, rather.

Q. Where was she when you examined her?

A. If I remember rightly, she was still made fast alongside the ship.

Q. Is that where you made your survey of her?

A. Where I made my first examination of her.

Q. What did that examination consist of?

(Testimony of Frank Walker.)

A. Simply looking at the barge as she lay capsized.

Q. You did not get much information?

A. No, none.

Q. Of course, a man in your profession is so used to noting and finding out the cause of things and ordinary matters in your line, that sometimes you come to conclusions, do you not, without investigation and an investigation may prove it to be true, but you sometimes reach conclusions on a cursory examination, don't you?

Mr. BOGLE.—I object as incompetent and immaterial.

A. Sometimes I hazard an opinion to myself. [216—45]

Q. Did you hazard an opinion to yourself when you first saw this capsized lighter, as to the cause of its capsizing?

A. No, I took the statements of the people, and believed it was correct that the cargo shifted on the barge and caused her to capsize.

Q. What people made you that statement?

A. I think it was the master, the master and mates.

Q. And before that you had not hazarded an opinion yourself?

A. No, I asked the reason for it, to start with, what caused it.

Q. Did not there appeal to your mind a reason, at once?

Mr. BOGLE.—I object as incompetent.

A. Well, I cannot say so. A barge is very apt to capsize.

(Testimony of Frank Walker.)

Q. Don't they capsize for one well known reason?

A. They capsize for various reasons. Improperly loaded. Water in them. Shifting cargo. It is very easy for them. In towing a barge of gravel or sand or brick or anything of that kind, get into a seaway and shifting it over, in nearly every case the barge will go right over.

Q. Did you ever know of a barge to capsize from stress of sea or wind, and nothing else?

A. Yes, I have known them to capsize from stress of weather combined with shifting of cargoes or leakage.

Q. Now, you are getting on to something that seems to me is the true reason for the capsizing of the barge, and that is leakage. Is not that the only thing that will cause them to capsize?

A. Oh, no. Not in that case, where the barge had no water [217—46] in it when I examined it.

Q. Now, let us assume that we are loading a barge with creosote drums. A. Yes.

Q. Do you know who loaded them and how they were loaded in this instance?

A. I don't know how they were loaded.

Q. Well, assume then that barge was loaded with drums athwartships lying on their sides? A. Yes.

Q. Do you remember the way these iron drums had iron rims around them projecting over the sides, and they were built up as a pyramid, three tiers high, so that if that barge capsized she must have capsized athwartships? A. Yes, sir.

Q. Now, how could that barge so loaded capsize

(Testimony of Frank Walker.)

athwartships unless she is leaking?

A. Oh, very easily.

Q. Just explain it.

A. By the shifting of the cargo on the deck of the barge.

Q. How could that cargo shift?

A. There was a swell, and the vessel bumped into the barge or the barge bumped into the vessel and caused it to shift. I was satisfied of that.

Q. If it shifted you mean the barge must list?

A. Yes.

Q. If it listed to one side what would be the result on the cargo?

A. Result in the cargo sliding overboard and over would go the barge. **[218—47]**

Q. As soon as the drums slid overboard, either port or starboard side, would not the barge right itself on the other side?

A. The barge would go down on the heavy side.

Q. When that was released from the weight though she would right herself?

A. No, she would go over again.

Q. Right herself and go to port, if the load had gone over the starboard side?

A. If the barge was to tip again over to this side, if there was some cargo aboard, it would come on the other side.

Q. And throw over something there.

A. We can tip a barge over with a few tons of gravel. They frequently do it, to turn it upside down to cork them.

(Testimony of Frank Walker.)

Q. If a barge is leaking and has water in it there would be a permanent list, increasing all the time, would there not? A. Yes, a gradual list.

Q. That would absolutely necessitate the capsizing of the barge?

A. No, that would speak for itself and be looked after by the people in time.

Q. Suppose that the barge was listing gradually at night time, leaking, that would be a permanent list that eventually would capsize the barge?

A. Yes, eventually capsize the barge.

Q. Do you know which way this barge capsized?

A. No, I do not.

Q. Where did you get, or did you get any information as to the cause of the capsizing? [219—48]

A. I got my information from the crew of the ship.

Q. What was said to you?

Mr. BOGLE.—I object as immaterial and hearsay.

A. Just what it states in the report.

Q. Do you know now what it says in the report without refreshing your recollection?

A. No. I think it says a heavy gale sprang up, an unusually heavy gale for that harbor, southwesterly, and that she bumped into the "Sardhana" and caused the cargo to shift and the barge capsized. I think something to that effect.

Q. The report says: "In my opinion the cause of the accident was entirely due to the part cargo of drums shifting on the deck of the barge, the harbor in which the ship and barge were moored is considered perfectly safe, and protected from wind, but

(Testimony of Frank Walker.)
on this occasion an exceptionally heavy ground swell swept in."

A. The first part of the report, will you read that?

Q. That is the report obtained, you say, from the manager of the creosote works and from the officers of the bark "Sardhana"?

A. Yes, sir, that is right.

Q. Did you give your opinion in your own way—where did you get your—

A. I gave my opinion from the information I received.

Q. So that your opinion and the information you received in regard to the capsizing of the lighter are supposed to be identical?

A. This states here "Before a tug could be obtained to move the barge she collided heavily with the bark which [220—49] contact shifted the drums to one side, and caused the barge to capsize."

(Previous question read to witness.)

A. Well, I formed my opinion from the information I received from the facts that I saw.

Q. Now, after this first visit to the barge, I understand you saw it again?

A. I saw the barge again, yes.

Q. Where was it then?

A. I think the barge was at West Seattle at that time. I would not swear it was.

Q. Was righted when you saw it?

A. The second time, yes.

Q. How long afterwards? A. I could not say.

Q. A number of days? A. I could not say.

(Testimony of Frank Walker.)

Q. What does the report say?

A. I do not pretend to remember five or six years. Yes, the report shows it was some days after. The report covers from November 23 to December 12.

Q. So that it was probably around December 12th that you made this further examination?

A. No, I could not say the date of it; I would not attempt to say.

Q. It was some days after you first saw it?

A. Yes, they towed her away and righted her and she was on the gridiron.

Q. What was the examination and survey you made then, do you remember? [221—50]

A. Well, I walked around the barge and examined her. There was nothing done to the barge, and she was not leaking.

Q. That is the extent of your examination, walking around the barge?

A. That was all that was necessary. There was nothing done to her. She was on the gridiron.

Q. You mean she was out of water?

A. Yes, sir.

Q. You did not do any corking?

A. I did not have anything done at all.

Q. That examination formed the basis of your report?

A. That examination was sufficiently close to be sure of the condition of the barge.

Q. It formed the basis of your report?

A. Yes, sir.

Q. Now, the next matter that I will ask you about

(Testimony of Frank Walker.)

is the report on the damaged creosote. I believe you have already said that statements of facts contained in your report are more apt to be correct than your recollection now? A. Yes, sir.

Q. Because they were made at the time?

A. Yes, sir.

Q. Who was it that emptied these 741 damaged drums and measured the creosote contained in them?

A. It was done under the superintendent of the Pacific Creosoting Company.

Q. You had nothing to do with that?

A. Oh, no.

Q. They simply reported to you that they had emptied these [222—51] drums and measured the contents?

A. I saw quite a number emptied.

Q. They reported to you that they had measured the contents of the damaged drums?

A. They gave me the meter readings.

Q. Then they contained how many gallons?

A. They gave the meter reading as it was discharged, as it was emptied.

Q. Did you have anything to do with the compilation of the aggregate number of gallons?

A. I took the meter readings and made my own deductions.

Q. What was it you did in the way of figuring, actually?

A. The superintendent would give me the reading of the meter each day.

Q. Each day? A. Each day.

(Testimony of Frank Walker.)

Q. It took more than one day to empty these?

A. I mean the whole cargo.

Q. I speak of the damaged drums. Did not you treat this separately from the other drums?

A. The damaged drums were all put to one side and were last emptied.

Q. When you took these up and began to empty the damaged drums, was the meter reading made to you as a finality or was it made piece-meal?

A. Made to me in piece-meal. This is the final entry.

Q. It was your mental calculations that arrived at this result that there was so many gallons of creosote?

A. It was arrived at jointly between the superintendent of the creosote company and myself. **[223—52]**

Q. Did you see them in the process of emptying the drums? A. Yes, a great number of them.

Q. Then from the contents of the damaged drums you proceeded to take that amount from the amount you supposed the drums should have contained, if full? A. Yes, sir.

Q. And the result was the lost creosote.

A. The creosote that was missing.

Q. When you first went on board the "Sardhana," did you make any examination of the hold of the vessel to find out how much creosote was in it?

A. No, I did at the last. You could not tell at the first.

Q. At the last you did? A. Yes, sir.

(Testimony of Frank Walker.)

Q. What did you find?

A. I found there was a little creosote in the bilges.

Q. How many inches? A. I could not say.

Q. You did not make any soundings?

A. I went down in the hold with the superintendent and that creosote was taken out of the bilges and sent ashore.

Q. You saw it taken out. How was it taken out?

A. In barrels, if I remember right.

Q. Pumped out by the crew?

A. I don't know who pumped it out.

Q. You saw it being put in barrels, did you?

A. I saw it in barrels.

Q. Do you know what became of it afterwards?

A. Put in the tank with the rest. **[224—53]**

Q. Did you see it?

A. I did not stand by watching it go into the tanks.

Q. How do you know it went into the tank?

A. I am satisfied it did; they would not throw it away.

Q. Do you have a record of the amount of creosote put in barrels?

A. No, not separately, because I had the final meter reading, that was dumped with the rest of the damaged stuff.

Q. Your final meter readings shown by your report, do not show a statement of the creosote from the barrels?

A. No, because they treated that the same as the rest of the cargo. It was just the final clean-up.

Q. The creosote from the barrels went into the

(Testimony of Frank Walker.)

general tank with the balance of the creosote, did it?

A. Yes, sir.

Q. And treated as good creosote?

A. I don't know anything about that how they treated it. That is what they gave me as good creosote.

Q. Gave credit. A. In the figures.

Q. What became of the 56,000 gallons that were missing?

A. I don't know. All I can tell you is what the crew told me, that it was pumped overboard.

Q. What member of the crew told you it was pumped overboard?

A. I think several of them. The captain did not, but the mates did.

Q. The mates. That is the only way that it could be accounted for?

A. That is the only way; it was not in the bark.

Q. Could not get out of the ship? **[225—54]**

Q. Do you know how much was finally pumped out of all the limbers?

A. Three or four thousand gallons.

Q. How do you know?

A. Well, I recollect that is about what we estimated it.

Q. How much would that be in barrels?

A. I could not tell you.

Q. Could you give an estimate?

A. No, I could not.

Q. Do you know anything about how long it took to pump it? A. No.

(Testimony of Frank Walker.)

Q. Did you see them pumping on more than one occasion? A. No.

Redirect Examination.

Q. (Mr. BOGLE.) Do you know the number of gallons contained in a drum of creosote?

A. I do not recollect. I did know at the time but it has gone from my mind.

Q. Do you remember whether the gallons contained in your report referred to Imperial gallons or United States gallons?

A. I could not swear to that. I think it was Imperial gallons all of it.

Q. I call your attention to a note at the bottom of Exhibit "I," and ask you if that is your note, in pencil?

A. No, I did not make that. That is not my writing.

Q. It is "56,267.2 United States gallons equals 46,889 1/3 Imperial gallons."

A. I don't know who made that note. I don't know anything **[226—55]** about it.

Q. Did you check any of the meter readings of the creosote that was emptied into this tank that were made from day to day at the plant of the creosote company, as to the number of gallons that were dumped into the tank?

A. Yes. I checked them and satisfied myself that they were correct.

Q. Counsel has examined you upon your survey of the fire damage. You stated that some of the information contained in that survey was taken from an

(Testimony of Frank Walker.)

abstract of the vessel's log. Was there any statement contained in that survey as to the extent of the damage, extent of the fire obtained from any other source than your own inspection?

A. No, not the extent of the damage.

Q. That was from your own inspection?

A. There was some stores damaged that I did not take any note of at all.

Q. Do you know at what temperature creosote is inflammable? A. No, I do not.

Q. Mr. Walker, when was this matter first taken up with you by the libelant in this case as to the question of getting your testimony in this case, do you remember?

A. No, as near as I can recollect just a few days ago.

Q. Do you remember whether or not you were leaving town and were unable to attend at the hearing yesterday? A. Yes, I do.

Q. When did you return? A. This morning.

Q. And you testified here this morning and you would not have had an opportunity to examine that door, would you? [227—56]

A. No, I had no opportunity to examine that door this morning.

Q. Mr. Walker, the libelant's answer to interrogatories which counsel has referred to. The answer to the 6th interrogatory states that the damage was such as to require repairs, and goes on to say what the repairs would be. Subsequently that the repairs were made by the ship's carpenter. Have you any

(Testimony of Frank Walker.)
information about that? A. No, none at all.

Q. Do you know whether they made the repairs here or not?

A. I do not know who made the repairs.

Q. Mr. Walker, from your examination of this barge do you state positively there was no water in her at the time she capsized?

A. There was no water in her at the time.

Mr. McCLANAHAN.—I object as calling for a conclusion. He made no examination of the barge at the time.

Q. I will ask you whether there was any water in her.

A. There was no water, the barge capsized. No water in her when I examined her, on the gridiron.

Q. Was it necessary to pump any water out of her before she could be towed to West Seattle before putting her on the gridiron?

A. Not to my knowledge.

Q. If she had been full of water and leaking, could you easily tell whether she had water in her?

A. When she was capsized?

Q. If this barge had no water in her at the time she capsized was there any way, any cause, anything which would cause her to capsize on the shifting of the cargo? **[228—57]**

A. Not that I could see; the heavy swell would shift the cargo.

Q. This report upon this damage to the barge, was that made from one inspection that you made of the barge when she was on the gridiron, or from all your

(Testimony of Frank Walker.)

inspections at various times?

A. I inspected her when she was bottom up and when she was on the gridiron.

Q. And your report was made from these inspections? A. Yes, sir.

(Testimony of witness closed.)

Mr. BOGLE.—I offer in evidence the survey report identified by the witness relating to the fire on board the "Sardhana."

Paper marked Libelant's Exhibit "K," filed and returned herewith. **[229—58]**

[Testimony of Joseph Robert Barnaby, for Libelant.]

JOSEPH ROBERT BARNABY, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) What is your business?

A. Importing creosote.

Q. Where do you reside? A. Seattle.

Q. Do you import creosote on your own account or represent some firm or corporation?

A. I import on my own account. Previously I acted as agent of Blagden, Waugh & Company, of London.

Q. Were you acting as their agent in the year 1908?

A. Yes, sir. I was their agent in the year 1908.

Q. Mr. Barnaby, do you know whether or not the firm represented by you, sold any creosote to the Pacific Creosote Company in the year 1908, which

(Testimony of Joseph Robert Barnaby.)

was shipped from England to Eagle Harbor by the British bark "Sardhana"?

A. Yes, sir, I sold that cargo myself to the Pacific Creosote Company.

Q. The negotiations were made through you, were they? A. Yes, sir.

Q. Do you know how many drums of creosote were shipped in that consignment?

A. As far as my recollection, about 2700.

Q. Do you know what price the Pacific Creosote Company paid you, or your comany?

Mr. McCLANAHAN.—I object as immaterial.

A. Yes, I do know the price by looking up my records. I think I recollect the price.

Q. Mr. Barnaby, I hand you a document marked exhibit "C," and ask you if you know, of your own knowledge, what that **[230—59]** document is?

A. Yes. That is the Consular invoice for that particular cargo.

Q. And the different items on there represent the cost to the creosote company of the different items there shown, and the aggregate sum is the sum paid by the creosote company for that cargo?

Mr. McCLANAHAN.—I object as immaterial.

A. Yes, sir, that is the amount.

Q. Is that the reasonable market value of that, do you remember?

Mr. McCLANAHAN.—I object on the ground that the witness is not qualified to testify.

A. Yes, sir.

Q. How long have you been engaged in the creo-

(Testimony of Joseph Robert Barnaby.)

sote business? A. Seven years.

Q. During that time had you been selling creosote to any great extent?

A. Oh, yes, quite a large extent.

Q. And do you know, among the sales that you have made, that the price paid for this creosote was the reasonable price for the amount of creosote in drums, contained in this consignment?

A. Yes. I recollect now that the price of that cargo was sixpence and nine-sixteenths, c. i. f. Seattle.

Q. Per gallon? A. Yes, sir.

Q. I call your attention to the different items.

A. I remember the amount now which I sold the cargo at to the Pacific Creosoting Company. **[231—60]**

Q. I call your attention to the different items in the Consular invoice, and ask you if the amounts shown opposite the different items, the total of which make up the aggregate sum which was paid for the creosote, were the reasonable value of the different items of drums, creosote, etc., as shown?

Mr. McCLANAHAN.—I object, the witness is not qualified.

A. Yes, these are the reasonable figures. These figures are correct; I know them to be.

Q. As agent of the shipper of this creosote, did you attend at Eagle Harbor at the time this creosote was being unloaded, to see the condition of the creosote? A. I did.

Q. And were you there at all times when the creo-

(Testimony of Joseph Robert Barnaby.)
sote was being unloaded?

A. No, I was not. I was there several times.

Q. Will you state to the Court, Mr. Barnaby, whether or not any of the drums containing this creosote were damaged?

A. A great number were damaged.

Q. Could you give us an estimate of the number of drums which were damaged?

A. Well, from my observation about 25% of the whole cargo was damaged.

Q. About what would that be, providing the cargo was 2753 drums?

A. There was about 700 drums damaged according to my recollection.

Q. What was the extent of the damage to these drums?

A. Why, the drum, the packages were unmerchantable, they were in such a bad state. **[232—61]**

Q. That is, the drums themselves? A. Yes, sir.

Q. What about the contents of the drums, did you make an examination of that? A. Yes, sir, I did.

Q. What could you say as to the contents of these drums?

A. Well, they were pretty well emptied; very little creosote in the drums.

Q. You have no idea as to the amount of loss of creosote from these drums, have you?

A. No, except that I opened the bungs of many of them. I looked in and I could see that many of them were only a third full; some were half full.

(Testimony of Joseph Robert Barnaby.)

I do not think that there were any that I saw more than half full.

Q. Mr. Barnaby, do you know the number of gallons contained in a full drum of creosote?

A. Yes, sir; 90 Imperial gallons.

Q. What would that be in United States gallons?

A. About 109 to 110.

Q. Do you know the reasonable cost or value of a drum of creosote delivered at Eagle Harbor, that is the empty drum itself?

Mr. McCLANAHAN.—I object on the ground that the witness is not qualified.

A. Yes, because I do a considerable business in the sale of empty drums.

Q. What would be the value of an empty drum delivered at Eagle Harbor?

A. Six to seven dollars apiece.

Q. What is the value of the creosote per gallon delivered [233—62] to Eagle Harbor, taking into consideration the freight, insurance, etc., of carrying the creosote from your plant in England to Eagle Harbor?

A. Do you refer to this particular cargo?

Q. This particular cargo, yes.

A. Eight pence and nine-sixteenths to one penny, English gallon.

Cross-examination.

Q. (Mr. McCLANAHAN.) Mr. Barnaby, what was the c. i. f. value of the drums of creosote in November, 1908, here?

A. That is the same question?

(Testimony of Joseph Robert Barnaby.)

Q. The same.

A. Eight pence nine-sixteenths to one penny, Imperial gallon.

Q. Will you give me the c. i. f. value of the entire package? A. If you multiply by ninety—

Q. Please do so. Give it to us in American money.

A. That will take some figuring.

Q. I will give you paper and lots of time. You can do that, can you not? A. Yes, sir.

Q. Do so.

A. If my recollection is correct that would be $13.72.

Q. $13.72 represents the price of one drum of creosote including the package.

A. No, it would be more than that.

Q. Delivered in Seattle. A. $15.72.

Q. Then I repeat my question. $15.72 represents the price [234—63] of the drums of creosote, including the package delivered in Seattle in November, 1908?

A. Yes, sir. That is the c. i. f. price, sold in London.

Q. You deal in creosote drums? A. Yes, sir.

Q. What are they used for?

A. They are used for varied purposes. They are used for shipping whale oil back to Europe. For taking distillate from Seattle to Alaska, engine distillate. For taking fuel oil up to Alaskan points, and as containers for carrying oil all over the northwest.

Q. There is a market here for them?

(Testimony of Joseph Robert Barnaby.)

A. Yes, there is a good market for them.

Q. Do you know what became of these 700-odd drums that were taken out of the "Sardhana" damaged?

A. I do not know what became of them. I do not think anyone would buy them.

Q. I did not ask you that question. You do not know what became of them? A. No.

Q. Do not know where they are now? A. No.

Redirect Examination.

Q. (Mr. BOGLE.) In testifying as to the c. i. f. value, were you testifying as the value of this particular shipment?

A. Yes, sir, of that particular shipment sold in London at the time.

(Testimony of witness closed.) **[235—64]**

Afternoon session, Feb. 21, 1913.

PRESENT: Mr. BOGLE, for the Libelant.
Mr. McCLANAHAN, for the Respondent.

Mr. BOGLE.—I offer in evidence a certified copy of the protest.

Mr. McCLANAHAN.—We will admit it is a certified copy.

Paper marked Libelant's Exhibit "L," filed and returned herewith.

[Testimony of A. M. Beckett, for Libelant.]

A. M. BECKETT, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BOGLE.) What is your business?

A. Average adjuster.

(Testimony of A. M. Beckett.)

Q. How long have you been engaged in that business? A. Since 1897.

Q. With what firm are you at present connected?

A. Johnson & Higgins, of Washington.

Q. How long have you been connected with them?

A. With Johnson & Higgins and Johnson-Higgins of Washington, since September, 1911.

Q. Johnson & Higgins of Washington is the successor of the partnership of Johnson & Higgins?

A. Yes, sir.

Q. Practically the same firm. Prior to that time what business were you engaged in?

A. Average adjusting.

Q. And with what firms were you connected and where?

A. F. C. Dawson & Co. of Liverpool, England, and Manley Hopkins' Son & Corliss of London and Liverpool, England. [236—65]

Q. Mr. Beckett, in your experience as an average adjuster, have you adjusted any cases where the policy of insurance reads as follows or substantially as follows: "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire"? A. Yes, sir.

Q. Mr. Beckett, I wish you would state what the practice of English and American adjusters is as to that clause contained in a policy of marine insurance, what construction they place upon that clause?

Mr. McCLANAHAN.—I object as immaterial.

Q. That is, what loss would open up that warranty?

(Testimony of A. M. Beckett.)

Mr. McCLANAHAN.—I object as immaterial and on the ground that the question calls for a conclusion of law, and the witness is not qualified.

A. Under clauses such as you have read, containing the words "on fire," it is the practice of the adjusters in England to consider the warranty open, if some structural part of the vessel has been actually on fire.

Q. Does it depend upon the extent of the fire, or the fact that some part of the structure has been on fire?

Mr. McCLANAHAN.—I renew my last objection.

A. It depends on the fact that the structure has been on fire, but not the extent of the fire.

Q. Mr. Beckett, can you give us any idea of the number of cases that you have adjusted with that clause in the insurance policy?

A. It is impossible, but a considerable amount.

Q. Has that construction of that policy, as far as you know, coming within your own personal knowledge, ever been contested [237—66] by the marine insurance underwriters?

Mr. McCLANAHAN.—I object as immaterial.

A. As far as I know it never has.

Q. Mr. Beckett, do the English adjusters place any different construction upon a warranty which contains the word "burned" alone than they do that contains in the warranty the words "burned or on fire"?

Mr. McCLANAHAN.—I renew my last objection.

A. The construction placed is that the "on fire,"

(Testimony of A. M. Beckett.)

the opening of the warranty where the words "on fire" that is not a fire loss—than where the words "burned" only are used.

Q. Do you know when the words "on fire" were first added to these warranties in marine insurance policies in England?

A. Subsequent to the Glenlivet case, which was decided about 1893.

Q. Mr. Beckett, under the practice of the English adjusters, according to your testimony, not contested, or has not been contested to your knowledge by marine underwriters, would you consider that the burning of the door which was built into the bulkhead of the vessel, would be a burning of the structure?

Mr. McCLANAHAN.—I object on the same grounds.

A. I consider that would open the warranty.

(Question read to witness.)

A. Yes, sir.

Cross-examination.

Q. (Mr. McCLANAHAN.) Mr. Beckett, you say that the use of the words "on fire" first occurred after the decision in the Glenlivet case? [238—67]

A. To the best of my knowledge and belief that is so.

Q. Where were you when the Glenlivet case was decided?

A. I was at school, unconnected with average adjusting.

Q. What did you know about the Glenlivet case

(Testimony of A. M. Beckett.)

at the time of its decision? A. Nothing.

Q. What did you know at the time of the decision of the Glenlivet case about the practice of underwriters being controlled or regulated or governed by the Glenlivet case?

A. Nothing; but these things are covered by text-books.

Q. So your knowledge comes from text-books, does it? A. Prior to 1897.

Q. Your knowledge as to the substitution of the words "on fire" for the word "burned," does that come from the text-books?

A. Yes, that is covered by the text-books and also from common knowledge common to adjusting offices.

Q. Knowledge of insurance policies?

A. Yes, sir.

Q. You have such knowledge, have you?

A. Yes, sir.

Q. Are you familiar with Gow on insurance?

A. Yes, sir.

Q. That is a text-book, is it not? A. Yes, sir.

Q. Well recognized? A. Yes, sir.

Q. Are you familiar with Mr. Gow's construction of the expression "on fire" as contradistinguished from the expression "burned"? **[239—68]**

A. I think he says as I have given in my previous testimony.

Q. Gow, then, agrees with you, that the two terms are different.

A. Yes, I think Gow says that they are different.

(Testimony of A. M. Beckett.)

Q. That this expression "on fire" in modern policies is substituted for the expression "burned"?

A. No, it is included that way. "Burned" has not been left out of the clause, but "on fire" has been added.

Q. Have not you found policies with both "burned" and "on fire" in them?

A. Nearly all that have "on fire" have "burned" in as well.

Q. How would the f. p. a. clause read?

A. Warranted f. p. a. unless stranded, sunk, burned, on fire, or in collision.

Q. Have you seen the policies in suit in this case?

A. No.

Q. I hand you exhibit "A" of the libelant. Please examine that and you will see that the memorandum attached to the side of the policy has the expression "on fire" and nothing more, and that the body has the expression "burnt," and nothing more?

A. Yes, sir.

Q. Now, will you please tell me, Mr. Beckett, who does that placing on the margin of the policy of the memorandum that you find there? As a rule, does not the broker place it there?

A. The broker or the company.

Q. If that was placed there by the company, their printed forms have "burnt" in the body of the policy, don't you **[240—69]** think they would still place on the memorandum pasted on the side a clause that was harmonious with the body of the policy?

(Testimony of A. M. Beckett.)

A. No, sir, because the assured would not accept it.

Q. The assured would not accept it?

A. No, sir.

Q. You mean to say, then, that the assured has forced the insurance companies to the use of the expression "on fire"?

A. That is rather strong wording to use. It has become the general practice to put it in. I would not say that the assured has forced them to.

Q. Well, it is against the interest of the company, is it not, to use the expression "on fire," rather than "burnt," since the decision in the Glenlivet case?

A. Yes, sir.

Q. Can you explain how, then, a company would in the body of their policy use the expression "burnt," and then on that printed pasted slip use the expression "on fire"?

A. The printing in the body of the policy is an old form. If the assured wants better risks that are not covered in the body of the policy, they are given him by attaching the slip.

Q. Does he pay an additional premium where he has this slip pasted on the side, where the expression is "on fire," than if he had the expression in it "burnt"?

A. That is a matter which is purely a matter of arrangement between him and the company, about which I do not know, as an adjuster I would not know that.

Q. Have you in mind any particular adjustment

(Testimony of A. M. Beckett.)

that you **[241—70]** have made where there was a fire, which opened the policy, and there was no contest over it, and where the expression was "on fire" in the policy?

A. Yes, one I made up here recently.

Q. On this coast?

A. Yes, sir. Claims were paid according to the English law and practice, that was the condition of the policy.

Q. Suppose there should be a blaze in the structure of a ship, that was extinguished with a thimble-full of water, would you say the ship was on fire within the meaning and practice of adjusters?

A. I think that is a rather hypothetical question.

A. It is a hypothetical question.

Q. To what extent, might I ask the question, sir, to what extent was the vessel on fire?

A. To no material extent. Absolutely no damage, and yet there was a blaze in the structure of the ship that could be extinguished with a thimble-full of water.

Mr. BOGLE.—I object; there is no testimony like that in this case.

Q. In your opinion, would the ship be on fire within the meaning of that warranty?

A. It depends entirely, the question being the structure of the ship itself, if the ship itself, if the structure of the ship itself was on fire.

Q. That is included in my hypothetical question, the structure.

(Testimony of A. M. Beckett.)

A. It could not be put out with a thimblefull of water.

Q. Why not? A. How could it be? **[242—71]**

Q. If I should light a match to a beam of a ship, that would be a part of the structure, would it not?

A. Well—

Q. That happened to be saturated with creosote to the extent of a drop, the beam would be on fire when I lit it, would it not?

A. No, the creosote would be on fire. The beam would not burn for some appreciable time.

Q. Let us confine it so that the beam is on fire within an area that could be extinguished by a thimble-full of water, is the ship on fire?

Mr. BOGLE.—I object to this line of examination on the ground that it is not based on any facts in this case.

A. That is a case that we never met, to my knowledge.

Q. I am trying to find out the limit. You say that any structural part of the ship being on fire opens the warranty; is that correct?

A. As far as I know, that every case where the structural part of the vessel has been on fire, the warrant has been considered open.

Q. Now, is not this the better practice, the practice which prevails, that where there has been material damage to the ship, say the structural part of the ship, by the fire, the warranty is open?

Mr. BOGLE.—I object to the form of the question. This witness is not testifying as to what would be

the better practice. He is testifying what the practice is which is accepted and acknowledged by the English adjusters and underwriters. It is immaterial.

A. I do not think it is for me to decide which is the [243—72] better practice.

Q. Is not that the practice? A. No.

Q. Do you mean to say that any fire of any material part of the ship opens the warranty, no matter how minute the fire is?

A. The practice is defined to the structural part of the vessel being on fire.

Q. Can you answer my question yes or no, and then make your explanation. Do you mean to say that it is the practice that the warranty is opened where any part of the structural part of the ship is on fire, no matter how minute the fire is?

A. To the best of my knowledge and belief, yes.

Q. Now, will you tell me a case that has come within your knowledge, where there has been a trifling fire, doing absolutely no damage to the structural part of the ship, and yet the structural part of the ship has been on fire, where the warranty has been opened by the adjuster?

A. That is impossible. If the structural part of the ship has been on fire there must have been damage to it.

Q. Then your understanding is that there must be damage before the warranty can be opened by a fire? A. There cannot be a fire without damage.

Q. That is your understanding, then, that there

(Testimony of A. M. Beckett.)

must be damage before the warranty is opened?

A. I said the structural part of the ship must be on fire.

Q. That is true. Now, I ask you if you do not mean that [244—73] there must be damage?

A. I conclude if there is a fire there must be damage.

Q. And if there is no damage and yet there is a fire, then the warranty is not opened?

A. No, that is impossible.

Q. It is impossible. What?

A. To have something on fire and not be damaged.

Q. It is impossible, is it? What do you mean by damage as used in that connection?

A. Wood charred.

Q. Damage is something that lessens the efficiency or use of a thing, is it not? A. Well—

Q. You do not mean damaged ethically, do you, the beauty of it spoiled, you mean the use, don't you?

A. Yes, or anything that needed repainting, possibly that might be.

Q. Repainting, would that cover it?

A. If the paint was blistered off.

Q. Would you say that the practice is, that if there is blistered paint, that the warranty is opened?

Mr. BOGLE.—I object to this. I think the witness stated very clearly what the practice is.

A. Mere blistering of paint I should not consider the warranty opened.

Q. So that your illustration was not apt, was it? You gave that as an illustration, as some damage

caused by fire which would require repair. Suppose that one of the timbers of a ship be charred within the radius of a foot, just charred, so that you could take a [245—74] knife and scrape the charred embers off very easily, would you consider that that ship was damaged by fire? A. Yes, sir.

Q. You would. This question has never been decided, to your knowledge, by any court of law?

A. No.

Q. And you think after the decision of the Glenlivet case the Insurance Companies immediately changed their policies do you to "on fire"?

A. Yes, because the assured wanted better protection.

Q. You have never been in the insurance business?

A. Not until I was connected with Johnson & Higgins.

Q. How long have you been connected with them?

A. Eighteen months.

Q. Has your knowledge of Marine insurance been acquired since then? A. What I have.

Q. Practical knowledge.

A. It is very superficial, though.

Q. And has your knowledge of the dealings between the assured and the Insurance company been acquired since then? A. In what way?

Q. In any way. You said that the assured was the man that wanted better protection was the reason the expression was changed. Now, I say, has your knowledge of that been acquired since you have been with Johnson & Higgins?

(Testimony of A. M. Beckett.)

A. I don't quite get your question.

(Question read to witness.)

A. In this particular, do you mean? [246—75]

Q. Yes, sir.

A. It is common knowledge that it is the assured that wants it, not the company, and he is willing to pay for it.

Q. I am not asking you about that.

A. About the change "on fire"?

Q. I ask you about when you acquired this knowledge. A. About the change of "on fire"?

Q. About this requirement of the assured that he be given a policy with "on fire" in it rather than "burnt." When did you acquire that knowledge?

A. I cannot state the year and month I acquired it.

Q. Have you acquired it since you were with Johnson & Higgins?

A. It is common knowledge to anybody in business.

Q. It is not common knowledge, if you will allow me to contradict you, because I am in the Marine Insurance business in a way, and I never heard of it before, and I have been in it a good many years, so it is not common knowledge. Now, when did you acquire it? A. Oh, several years ago, anyhow.

Q. Before you went with Johnson & Higgins?

A. Yes, sir.

Q. In what way did you acquire it, what was your business? A. As an average adjuster.

Q. How did you acquire it and from where?

(Testimony of A. M. Beckett.)

A. As I say it is common knowledge.

Q. I would like to have, Mr. Beckett, some special, particular case in which you have been interested, where there was a trifling fire, that was conceded by both the Insurance company and the assured, to open that [247—76] warranty. A fire that did no material damage to the structure of the ship?

A. What do you call a material damage?

Q. Well, I will leave that out. You think that a material damage is anything that requires a dab of paint. I don't agree with you. We will leave that out. Give me the most trifling fire, in your own experience, that would open that warranty by the common consent of the assured and the underwriter. And I am going to ask for the details of it, if you will please give them.

A. It is hard to remember them.

Q. Take your time, we have all of that that we need.

A. I cannot remember back over thirteen years. The most trifling that I can at the moment think of, was the one I referred to a few minutes ago as being adjusted here.

Q. How long ago?

A. The fire occurred in January, 1912.

Q. What was the name of the ship?

A. The "Watson."

Q. What was the fire?

A. A fire in the linen locker.

Q. What was the extent of it?

A. I think about between three and four hundred

(Testimony of A. M. Beckett.)

dollars to the structure of the ship, and about four hundred dollars worth of linen burned.

Q. What insurance companies was that in?

A. In some American companies and some English companies. I cannot remember without the adjustment schedule what they were. [248—77]

Q. That is the most trivial fire that you can recollect? A. At the moment, yes.

Q. I want you to take plenty of time. You think with time that you could refresh your memory?

A. No, because it is of no interest to me at the time, after the case is once done and adjusted, whether the fire is big or small.

Q. Let it stand, then, that that is the most trivial fire that you recollect that opened the warranty. Is that all right? A. Yes, sir.

Q. And you have had how much experience, how many years? A. Thirteen years.

Q. Now, aside from your own experience, will you give us a case of the most trivial fire that ever opened a warranty where the expression in the policy was "on fire," and was conceded by both parties to have opened the warranty? I am not speaking of your own experience, but of your knowledge as an adjuster?

A. That is more or less confined to the adjustments that I have made up.

Q. So that you have no knowledge of any other fire that might be called a trivial fire, that has opened the warranty, than that which you have just stated?

A. No, I have no means of hearing of them.

(Testimony of A. M. Beckett.)

Q. Well, let us go a step farther. Give me another illustration of the next most trivial fire that has come within your own experience that has by consent opened the warranty where the expression was "on fire"?

A. I cannot quote you chapter and verse. [249—78]

Q. Haven't you any recollection of any adjustments made on fire losses on ships?

A. Yes, on damage.

Q. Where it is a particular average claim?

A. Yes, damage to cargo, but I cannot give you the names of the vessels, for I have adjusted many of them.

Q. Of course, in all these cases the fire has been quite considerable, has it not?

A. The fire itself in the cotton. Very often the damage to the ship is very trivial.

Q. I want an illustration other than the one given, where there has been a trivial fire to the ship.

A. I cannot get the names of the vessels, but I have adjusted a number in years past.

Q. Leave out the names of the vessels and tell me the circumstances of one adjustment where the structural loss was trivial.

A. If I could tell you the exact circumstances I could tell you the names.

Q. So you are unable then to give any other case where there was a trivial fire that opened the f. p. a. warranty?

A. I say I cannot give the chapter and verse, but

(Testimony of A. M. Beckett.)

I have adjusted several, I might say many, in damaged cotton.

Q. What has that to do with the f. p. a. clause?

A. That is insured.

Q. But the fire must be in the ship itself, not in the cotton?

A. But a majority of the cotton fires the fire is in the cotton and the cotton is in the ship. [250—79]

Q. But the warranty is not opened unless the structure of the ship is on fire? A. Sure.

Q. Cannot you remember any cases where the structure of the ship was on fire?

A. I cannot quote you the exact circumstance of the damage but there are—the "Mechanicien" was one.

Q. Is that the name of the ship? A. Yes, sir.

Q. What was the damage to the ship in that case?

A. As far as I remember, it was principally consisted of paint blistered off the inside of the hull.

Q. Paint blistered off the inside of the hull.

A. Yes, through the plates having been red hot.

Q. Is that all? And in your judgment that was fire in the structure of the ship?

A. Yes, sir, and the underwriters paid the loss.

Q. What was the damage resulting from that fire to the structure of the ship, how much damage?

A. I haven't any knowledge. I was not adjusting the loss of the ship, I was adjusting the loss on certain cotton.

Q. You haven't any knowledge of the damage done to the ship?

(Testimony of A. M. Beckett.)

A. It was immaterial to my adjustment.

Q. You haven't any knowledge of it. It was considerable was it not? A. I should say not.

Q. What did it consist of, simply the paint?

A. As far as I know. Might not have been. [251—80]

Q. Mr. Beckett, this Watson case was a fire damage, was it not, the entire damage?

A. No—that does not matter.

Q. Answer the question. It was simply a fire damage? A. Fire damage.

Q. No question of cargo insurance? A. No.

Redirect Examination.

Q. (Mr. BOGLE.) Does the fact that it was purely a fire damage make any difference in the construction of this clause?

A. Absolutely none under the policies.

Q. Mr. Beckett, in the case to which you refer, where the sole damage to the structure was the heating of the iron, could that have caused any considerable damage to the iron structure?

A. It might or might not buckle the plates. Depends on the amount of heat.

Q. The greatest damage that it could do would be to buckle the plates? A. Yes, sir.

Q. In your business of adjuster, has it been confined to Marine adjusting? A. Entirely.

Q. Is it not true that the business of marine adjusting requires more or less knowledge of marine insurance? Are you not brought in contact with

(Testimony of A. M. Beckett.)

marine insurance in making up adjustments and losses? A. Yes, sir. [252—81]

Q. And are brought more or less in contact with underwriters and cargo owners? A. Yes, sir.

Q. Where you would have an opportunity to gain a knowledge of the facts of which you testified as being facts? A. Yes, sir.

Mr. McCLANAHAN.—I object to this line of redirect examination as being leading and not proper redirect examination.

Q. Mr. Beckett, in the construction of this clause, is it material as to what the extent of damage is, or is the material point in opening up the policy the fact there was a fire in the structure of the vessel?

Mr. McCLANAHAN.—I object as not proper redirect examination.

A. The point is whether the structure has been on fire.

Q. Counsel has referred you to Gow on insurance, marine insurance. Do you know who Mr. William Gow is, the author of that work? A. Yes, sir.

Q. Who is he?

A. He is now secretary of the British Foreign Marine Insurance company of Liverpool.

Q. He is a representative of the underwriters?

A. Yes, sir.

Q. (Mr. McCLANAHAN.) What was he when he wrote his book?

A. An underwriter of the London Marine Insurance company of Liverpool.

Q. He is considered an authority, is he not?

(Testimony of A. M. Beckett.)

A. Yes, sir.

Q. On marine insurance?

A. Elementary authority, that is as far as the elementary [253—82] text-books go. He does not rank with McArthur and some authorities.

Q. (Mr. BOGLE.) I hand you this document, and ask you if that is the signature of Mr. Gerald Low?

A. To the best of my knowledge and belief it is.

Q. Have you had an opportunity of seeing any number of his signatures so that you would know if that was his signature?

A. Yes, there are many of his signatures on our office files.

Q. I will ask you to look over that document and tell me what it is.

A. That is an adjustment for loss and damage to creosote.

Q. What vessel? A. By the "Sardhana."

Mr. BOGLE.—I offer this paper in evidence.

Paper marked Libelant's Exhibit "M," filed and returned herewith.

(Testimony of witness closed.)

Mr. McCLANAHAN.—It is stipulated by the parties to this action that the Court may take judicial notice of the case of the Glenlevit, reported in 7 Aspinwall, pp. 342 and 395, as being the law of England governing the facts presented in that case. The latter case being the decision of the Court of Appeal of England.

Mr. McCLANAHAN.—I understand, Mr. Bogel, that your case is now closed, with the exception of

(Testimony of A. M. Beckett.)

the depositions of Fred D. Beale and M. I. Helman. The deposition of [254—83] Mr. Beale to be taken in Portland.

Mr. BOGLE.—That is our case unless we find it necessary to take some rebuttal testimony.

Mr. McCLANAHAN.—That can be determined to-day.

Mr. BOGLE.—I think so. [255—84]

Seattle, February 20, 1913.

PRESENT: Mr. BOGLE, for the Libelant.
Mr. McCLANAHAN, for the Respondent.

RESPONDENT'S TESTIMONY.

[Testimony of H. C. H. Tuttle, for Respondent.]

H. C. H. TUTTLE, a witness, called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. McCLANAHAN.) You live in Seattle?

A. Yes, sir.

Q. What was your occupation in November, 1908?

A. Running a donkey-engine for the Washington Stevedoring Company at Eagle Harbor at that time.

Q. Do you remember at that time working on the bark "Sardhana"? A. Yes, sir.

Q. Where was she lying at that time?

A. Well, she was lying—

Q. At Eagle Harbor?

A. In Eagle Harbor, yes, sir.

Q. Where was your donkey-engine?

A. Tied alongside of the ship.

Q. On what side?

(Testimony of H. C. H. Tuttle.)

A. On the offshore side, the way the ship laid.

Q. Would that be to port or starboard side?

A. That part I don't remember so well.

Q. It would be the offshore side, the weather side?

A. I could always look right out and see Magnolia bluff.

Q. Do you remember at the time of working out there, the incident of the capsizing of the lighter of creosote drums? Do you remember the fact of such capsizing taking [256—85] place?

A. I remember seeing the scow turned upside down.

Q. You were working there, were you?

A. Yes, sir.

Q. On what side of the ship was that scow which capsized, moored? On the side you were on or on the other side? A. On the opposite side.

Q. That would be the lee side, would it?

A. I am not much of a mariner.

Q. It is the inshore side? A. Yes, sir.

Q. That is between the exposed bay, the way the ship lay, the ship and you were between the scow and the weather? A. Yes, sir.

Q. When you saw the scow was it upright in the water or capsized, turned over?

A. It was turned over, yes.

Q. Do you know what capsized that scow?

A. Well, no, I cannot say that I know that any more than we left it loaded with drums, that is all I know.

Q. On the occasion of the scow capsizing, did any

(Testimony of H. C. H. Tuttle.)

mishap happen to your scow on which the donkey-engine was? A. No, sir.

Q. How large was your donkey-engine scow?

A. Well, I could not say the number of feet, I never measured it. It probably would be twenty feet wide and 28 or 29 feet long.

Q. What freeboard would it have?

A. Oh, it would have all the way from 22 to 26 inches.

Q. What was on the scow that you operated? [257—86]

A. An ordinary donkey-engine and a few tools, and had two side bins for coal.

Q. You had a boiler on there?

A. Oh, yes, of course.

Q. How high did the boiler and engine extend above the deck of the scow?

A. Well, the ordinary boiler itself runs, when it sets on skids, runs about seven feet above, maybe an inch one way or the other.

Q. Mr. Tuttle, as the lighter lay on which the creosote was loaded on the occasion when the scow capsized, was that lighter exposed to any wind or sea?

A. You mean the one with the drums on?

Q. Yes.

A. No. It was not exposed near as much as the scow I had. It was out of the weather, the weather had to hit the ship first.

Q. Do you remember at this time when a fire occurred aboard the "Sardhana"?

(Testimony of H. C. H. Tuttle.)

A. I remember of a fire occurring on there, yes, sir.

Q. Did you at the time or subsequently have occasion to visit the scene of the fire on the ship?

A. Why, the next noon; me running the donkey, of course I did not run up there in the morning. But at noon I went and took an observation. It didn't look to me as though—

Mr. BOGLE.—I object, you have answered the question.

A. I saw it the next noon.

Q. What was the character of the fire as you saw it, or the results of it?

A. It looked to me very slight. I only saw a door and saw [258—87] the timbers smudged a little, that is all.

Q. Where were the timbers?

A. Just the ordinary props, that props the ship up. I don't know; I never worked aboard a ship and I cannot tell exactly.

Q. Mr. Tuttle, have you recently seen this door which you say was burned as the result of the fire?

A. I saw a door that looks very much similar to it; I would pretty near swear it was the same door.

Q. When did you see that door?

A. Up in the postoffice basement.

Q. When? A. This noon.

Mr. BOGLE.—We will not dispute but what that is the door.

Mr. McCLANAHAN.—It is admitted that the witness has seen the door.

(Testimony of H. C. H. Tuttle.)

Q. Have you ever had occasion, in firing your donkey-engine, to use dunnage from a vessel that has carried creosote? A. Yes, sir.

Q. What is the nature of such wood when used as fuel, how inflammatory is it?

A. Very inflammatory, carries a great many units of heat. We can only use one stick at a time if the steam is up. If you put in two sticks it will just tear things. Two ordinary cordwood chunks will make the pop go and you will have to have the injector going and the door wide open and run the engine to beat the band. Never was able to use but one ordinary stick at a time, and that would last when you were hoisting every minute, for 15 or 20 minutes. [259—88]

Q. Would it be long or a short time in catching fire? A. Oh, instantly.

Q. That has been your experience, has it?

A. Yes, sir.

Q. With dunnage saturated with creosote?

A. Yes, sir.

Cross-examination.

Q. (Mr. BOGLE.) What do you mean by dunnage, Mr. Tuttle?

A. Well, dunnage is anything they put in between the cargo. As I have had occasion to use it as it was taken out. They used it to put in between to keep the cargo from getting bruised or spoiled, and they put dunnage underneath. They had dunnage between the drums to hold it in position so that they did not get damaged.

(Testimony of H. C. H. Tuttle.)

Q. Do you know at what temperature—or what do you know of creosote as combustible?

A. Well, no, I don't, I never had that analyzed or anything like that, but I know you just take the ordinary stick with creosote and it goes just like that when you lay it on a fire.

Q. (McCLANAHAN.) You are speaking of dunnage?

A. Yes, that that is soaked with creosote from the ordinary voyage.

Q. (Mr. BOGLE.) Do you know anything about this fire? Do you know that it occurred?

A. When the fire occurred?

Q. Yes, sir.

A. At the time the fire occurred I was abed, in Newlin's house, probably 1600 feet from there. It was around 9 [260—89] o'clock, along there, between half-past eight and nine. I heard the hollering going on down there on the bay, and heard the bell ringing, and we went down and got in a boat to go over and then I heard them say, no use, it is all out. So the next day at noon time I had occasion to notice it, is all.

Mr. BOGLE.—I move to strike that portion of the answer as hearsay, where he states, "No use, it is all out."

Q. You did not go down to the fire that night?

A. No, sir.

Q. What was this bell you heard ringing?

A. It was the ordinary bell they ring for the time aboard ship.

(Testimony of H. C. H. Tuttle.)

Q. Did you know what the bell was, when you heard it, what it was ringing for?

A. I think there is a bell around the creosote plant. I think, if I remember right, they were ringing that to attract attention. There were two bells going. I remember that distinctly; one was louder than the other.

Q. Do you know when the second bell started to ring, how long after the first one?

A. I just had time—

Q. About how long?

A. It did not seem to me as though it was over—I could not say; it might be forty-five seconds or it might be a minute and a half.

Q. You think then forty-five seconds or a minute and a half after the bell rang on the ship, that the bell of the creosote plant was ringing?

A. There was another bell ringing right away afterwards. [261—90]

Q. What time of night was this, Mr. Tuttle?

A. Well, I should judge half-past eight or nine, somewhere in there; I had just got into bed.

Q. Did you get out of bed? A. Oh, yes.

Q. Did you get dressed?

A. Yes, and came down to the water's edge going to take a rowboat.

Q. Did you get the rowboat?

A. We got to the rowboat.

Q. Where was the rowboat?

A. Tied up to a little float that is there. There is a float back there where there is a road that goes

back into the country, I don't know just what dock they call it, but it is about the only floating dock there is over there, it runs up by Yuen's house towards the Blakely road.

Q. You untied the rope, did you?

A. No, I don't know whether I untied the rope. I know we were ready to get in the boat.

Q. Did you get the oars?

A. We always had the oars; we used to cache them under some willows. Joe went up to get them.

Q. Had you gotten in the boat and started off?

A. No.

Q. Did he return with the oars?

A. I don't remember that part of it so much. I know we were satisfied and remarked about it and started back.

Q. Quite a little commotion around was there?

A. Well, of course I could hear noise and one thing or other [262—91] aboard ship and people away over along the shore. I could not tell exactly the words.

Q. Do you know whether any one went aboard ship to assist them in putting out the fire?

A. I don't know exactly about that any more than I heard remarks afterwards, you know.

Q. Do you know whether any chemical fire-extinguishers that belonged to the company were used to assist in putting out the fire?

A. I don't know about that.

Q. Where was the "Sardhana" anchored?

A. She was anchored not very far from the dock.

(Testimony of H. C. H. Tuttle.)

Q. About how far?

A. Well, I don't know; about between three and four hundred feet, somewhere around there. I don't remember the number of feet. It was only a little bit to row, did not amount to anything.

Q. How far was the house where you were sleeping from the ship?

A. From the house to the ship, I don't know. It might be probably 1600 or 1800 feet.

Q. How far was it from the house to the place Where the rowboat was tied up?

A. Well, that is a different line. I was figuring on an air line to the ship.

Q. I want to find how far from the house the rowboat was that you went to?

A. I don't know, just an ordinary block from there, two or three hundred feet.

Q. From there to the rowboat? [263—92]

A. Yes, sir. It is right along the bank, the house only sets back up a little ways.

Q. Mr. Tuttle, where was this door located which was burned on the ship, I mean?

A. It was down in underneath, some door, I believe, they used for stowing some ship's goods or something; I don't know exactly. There was a door there, I know that.

Q. You did not see it until the next noon.

A. No, I just took an ordinary glance at it. The fire didn't look only slight to me.

Q. Did the door go into the wall, the bulkhead of the ship?

(Testimony of H. C. H. Tuttle.)

A. It looked to me as though, standing up this way.

Q. Was it not built into the bulkhead the same as an ordinary door built into the side of this wall?

A. If I remember right, hanging in the same way, something like that; I am not sure.

Q. Was there anything else burned beside the door?

A. Well, there was just the ordinary frame around there scorched something like the door.

Q. You mean the sides of the wall?

A. Yes, sir, the sides of the bulkhead, whatever it was there.

Q. For how great a distance was it burned, Mr. Tuttle?

A. Well, that part of it I did not take such awful good observation of it.

Q. Was the ceiling scorched or burned?

A. The ceiling looked more smoked to me than scorched.

Q. Did you examine it?

A. With my hands, no. It just looked ordinarily dirty and smoked. [264—93]

Q. You have seen this door and know the extent of the burning? A. Yes, I saw that.

Q. And the bulkhead was about the same?

A. Yes.

Q. Mr. Tuttle, what was the size of the scow upon which the drums of creosote were loaded, the scow which capsized?

A. I don't know exactly. I should judge it was

(Testimony of H. C. H. Tuttle.)

about, if I remember rightly, it was 32 to 36 feet wide and maybe about 60 feet long, something like that.

Q. And you were engaged in unloading these drums over the side of the ship on to this scow.

A. Yes, sir.

Q. Who had charge of the loading on this scow?

A. Well, the foreman was taking out the drums.

Q. Who was that? A. Joe Preece.

Q. Did the Washington Stevedoring Company have a contract to unload them?

A. He was working for them.

Q. Did they furnish the scow?

A. I don't think so.

Q. How many days had they been working unloading the cargo before this 18th of November, the day on which this scow capsized?

A. I don't remember that so well, but it seemed to me toward the middle of the unloading of it, if I remember right.

Q. Do you know how many drums of creosote were upon the scow at the time of the capsizing? [265—94]

A. I don't remember that precisely, but I think it was very close to being loaded.

Q. Did they tow her to the dock of the creosote company that night? A. No.

Q. Would they not have done that if she had been fully loaded?

A. There is lots of times they left the scows there loaded for a day or two.

(Testimony of H. C. H. Tuttle.)

Q. Fully loaded? A. Yes, sir.

Q. Out in the bay?

A. They would move them up sometimes alongside the ship forward and move them around and moor them.

Q. Loading more than one scow at a time?

A. No, only one scow at a time is all they handled loading.

Q. When did you leave the ship on the night the scow capsized? A. I ordinarily left—

Q. When, what time?

A. Just as it was getting dark, you know, we used to quit.

Q. Did the scow capsize during the night or day?

A. During the night.

Q. How was the "Sardhana" anchored in the harbor on this night?

A. If I remember right, she was anchored forward.

Q. Are you sure she was moored aft?

A. I feel pretty sure, but my memory is not so clear on it. I think she was moored aft and anchored forward.

Q. You don't know that. You don't want to swear to that?

Mr. McCLANAHAN.—I think he has made it clear.

A. That is as far as I remember. [266—95]

Q. I think you stated that you did not know.

A. I feel pretty sure that is the way it was, but I would not swear to it.

(Testimony of H. C. H. Tuttle.)

Q. Which way was the "Sardhana" lying?

A. She was lying on the north side but in the bay.

Q. In the bay. A. Well, she was—

Q. Was the bark headed out toward the mouth of the bay?

A. Her nose was pointing toward Winslow, and as she lay there I am pretty sure her aft end was moored in order to hold her tight.

Q. Did you keep a watchman aboard the scow?

A. We gave the watchman on the ship an extra compensation when she is tied that way, to watch the donkey scow.

Q. Both scows were lashed to the ship, were they?

A. Oh, yes.

Q. You do not know anything about the condition of the weather on that night, do you, the night the scow capsized?

A. I don't exactly know, but I think it was pretty windy, pretty rough, if I remember right; it has been so long ago. I think it was pretty windy.

Q. Did you testify as to why she capsized?

A. No, I cannot do that.

Redirect Examination.

Q. (Mr. McCLANAHAN.) Do you know what a bulkhead is?

A. A bulkhead in a ship, as I understand, is a big frame proposition, that is all I know about it.

Q. Do you know where it is located in the ship, or where it [267—96] can be located?

A. No, I don't say that I can, exactly.

Q. You said on cross-examination that the bulk-

head had been burned the same as this door that you saw downstairs?

A. This framework around the door, whatever it was, if I remember right, was scorched in a similar condition to the door.

Q. Do you draw a distinction between scorching and burning?

A. Some of it just ordinary as if the heat was strong on it, that is all; it was not cleanly put out of commission entirely—plenty of strength left in the wood.

Q. If the bulkhead that was referred to by counsel extended from one side of the ship to the other, do you mean to convey the idea that all that space of wood had been burned as the door was?

A. Oh, no, a little ways, just a little bit, mostly on the right hand looking to the door.

Q. (Mr. BOGLE.) What do you mean by a little bit?

A. The heat seemed to be more to that side of the door like than it was to the other side, that is all. It seemed to be one little spot. Knowing the way the dunnage lights up in the boiler. I never gave it a second look, for if it had got in the dunnage they never would have had any ship—that would have been all there was to it.

Q. If this fire had reached the creosote there would have been a very serious conflagration?

A. I guess there would.

Q. (Mr. McCLANAHAN.) You were describing the extent or area [268—97] of the fire under

(Testimony of H. C. H. Tuttle.)

your recross-examination, and you gave your arms a space of two and a half or three feet. Was that intended to indicate the area of the fire?

A. The way it looked to me as though it did not amount to only a little bit.

Q. Is that the idea of the extent of the fire, two or three feet?

A. Just a little small space, that is the way it looked to me.

Q. (Mr. BOGLE). Do you mean to swear, Mr. Tuttle, that the fire did not extend more than three feet in length along the bulkhead?

A. That is the way it looked to me.

Q. Is that both sides or one side?

A. It seemed to be most on one side of the door.

Q. How about the left-hand side—what was the extent of the fire on that side of the bulkhead?

A. Did not seem to be any to amount to anything.

Q. Do you intend to swear there was no burning on the left side of the door?

A. I did not notice any.

Q. (Mr. McCLANAHAN.) Do you mean to say there was any burning on the right-hand side of the door? A. It looked that way.

Q. You have seen the door, have you?

A. Yes, sir.

Q. Do you remember, when you looked at the door, that there was an unburned space on the right-hand side of the door? [269—98]

Mr. BOGLE.—I object to counsel leading the witness.

(Testimony of H. C. H. Tuttle.)

A. Well, there is a burned space there somewhere, but I don't remember.

Q. Let me ask you this: If this fire was indicated as having burned in more than one place?

A. Did not look that way to me.

(Testimony of witness closed.) [270—99]

[Testimony of Capt. David Baird, for Respondent.]

Capt. DAVID BAIRD, a witness, called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. McCLANAHAN.) Have you ever been a seafaring man, Captain? A. Yes, sir.

Q. How long have you seen sea service?

A. Thirty-three years.

Q. What was your occupation in November, 1908?

A. I was Marine Superintendent in Seattle for Andrew Weir & Co.

Q. Who was the owner at that time of the bark "Sardhana"? A. Andrew Weir & Company.

Q. What were your duties with reference to the "Sardhana" when she was loading here in November, 1908?

A. My duty was to see the ship discharged and loaded properly and fitted for her voyage.

Q. Did you have any other conduct of the affairs of the ship within these limits?

A. I had a free hand.

Q. Where was the ship discharging her cargo at that time? A. At Eagle Harbor.

Q. What was the cargo?

A. Creosote in drums.

(Testimony of Capt. David Baird.)

Q. What kind of drums were these, Captain?

A. Iron drums.

Q. Can you describe them more specifically?

A. About ninety gallon each, I should judge, riveted drums with iron bands.

Q. Were they cylindrical in shape?

A. Yes, sir. [271—100]

Q. The diameter being the same throughout?

A. Yes, sir.

Q. Flat top and bottom?

A. Yes, sir, the ends were flat.

Q. You speak of bands; what were they?

A. Each side of the bunghole, I suppose about eight inches from it, two iron bands, go completely around the drum about three-quarters wide and about an inch and a half high.

Q. That is they projected beyond the surface of the drum an inch and a half or an inch and a quarter?

A. Yes, sir.

Mr. McCLANAHAN.—I would like to introduce, with your consent, Mr. Bogle, a chart showing the exact location of Eagle Harbor, a chart issued by the Coast and Geodetic survey.

Chart marked Respondent's Exhibit "3," filed and returned herewith.

Q. Captain, will you mark with a cross the approximate place where the "Sardhana" was lying in Eagle Harbor?

(Witness does so.)

Now, then, on the margin of the map will you duplicate the cross and put your initials?

(Testimony of Capt. David Baird.)

(Witness does so.)

Which way was the bow pointed?

A. The vessel was moored with her head to the westerly.

Q. Westerly magnetic? A. Yes, sir.

Q. How were the mooring lines run?

A. She had two anchors out ahead; she had mooring lines to a dolphin over each quarter aft.

Q. How far did she lie, approximately, from the slip of [272—101] the wharf of the Pacific Creosoting Company?

A. Anything from 50 to 100 feet.

Q. In what general direction was the Pacific Creosoting Company's wharf, as it lay there?

A. On the starboard quarter.

Q. On what side of the ship was the donkey-engine used to discharge the ship?

A. Starboard side.

Q. Where were the lighters used?

A. On the port side.

Q. Were they or were they not the lighters that were used for discharging, moored to the ship?

A. Yes, they were moored to the ship.

Q. What was the size of these lighters? Approximately? A. About 60x30, no less.

Q. What freeboard would they have light, in your opinion? A. Three feet.

Q. What would they have loaded?

A. 18 inches.

Q. Do you remember the occasion of one of these lighters capsizing? A. Yes, sir.

(Testimony of Capt. David Baird.)

Q. Did you see the capsized lighter? A. No.

Q. Just remember that there was a lighter capsized.

A. It was no interest to me, because the cargo had been delivered as far as the ship was concerned, we were finished.

Mr. BOGLE.—I move to strike the answer as not responsive to the question. [273—102]

Q. How often have you had occasion in your experience, to visit Eagle Harbor?

A. I visited two ships there.

Q. Two ships? A. Yes, sir.

Q. What can you say with reference to its situation regarding sea and weather?

A. Oh, it is a landlocked harbor, perfectly safe, I should say.

Q. On what side of the vessel, lee or weather, did the lighters lie that were being loaded with creosote?

A. That depended on the direction of the wind.

Q. Do you know the general direction of the wind there?

A. Well, of course, if the wind was from the south, in this case the starboard side would be the lee, if the wind was from the northerly quarter, the opposite side would be.

Q. Then there is no prevailing wind that you know of there?

A. Westerly winds prevail at that time of the year.

Q. Do you know the prevailing currents, if any?

A. No current there.

(Testimony of Capt. David Baird.)

Q. Did you have occasion to see how these scows were being loaded? A. Oh, yes, I saw the scows.

Q. How were they loaded?

A. They put a tier of drums on end across the ends of the scow, then the rest of the drums were stowed athwartships in tiers.

Q. By the ends of the scows you mean what would correspond [274—103] to the bow and stern of the ship? A. Yes, sir.

Q. On these ends of the scow were placed tiers of drums upright? A. Yes, sir.

Q. From that I understand the tiers are then laid on their side athwartship? A. Yes, sir.

Q. Are they built up solidly that way or pyramidial?

A. They put one complete tier down. The next tier is brought in half the width of the drum and goes into the cont-line between the two drums below it.

Q. Goes into the cont-line between the two drums?

A. Yes, sir, and the tier comes in, the third tier comes in another lot of drums.

Q. Would it have been possible, in your opinion, for a scow so loaded, to have capsized fore and aft?

A. Impossible.

Q. So that if this scow did capsize it must have capsized athwartships? A. Yes.

Q. In your opinion would it have been possible for that scow to have capsized athwartships through such stress of weather as might have been possible where it lay on the port side of the "Sardhana" in Eagle Harbor? A. No.

(Testimony of Capt. David Baird.)

Q. If the scow did capsize, what in your opinion, then, was the cause of its capsizing? A. Water.

Q. Water where? [275—104]

A. In the hold.

Q. You have stated in your opinion it would be impossible for that scow to have capsized athwartships through such weather as might be possible where she lay, through the cause of weather alone or sea, why?

A. Never any sea in there, and besides I suppose the scow could stand up in there until the bottom drops out.

Q. Well, is there any reason why it would be impossible for the scow to capsize under these circumstances? A. No, I cannot say there is.

Q. Would the rings around the drums have any effect upon the matter? A. No.

Q. Would it be easier or harder for the drums to leave the scow and slide off into the sea because of these rings?

A. The rings would obviate them sliding off until the scow went to a certain angle, and the whole would come off.

Q. How would the water inside of the scow bring about its capsizing.

A. Give her a list, which would go as the water increased.

Q. Do you remember, Captain, the fact of a fire having broken out on the "Sardhana" at that time?

A. Yes, sir.

Q. Did you at any time after the fire have occasion to see it?

(Testimony of Capt. David Baird.)

A. The captain came over here and reported to me there had been a fire on board. I went to Eagle Harbor the next day with him.

Q. What for?

A. To see if any damage had been done to the ship. **[276—105]**

Q. What did you find?

A. I found there was no damage that required repairing.

Q. What was it exactly that you found?

A. I found that the fire apparently had taken place at the outside of the lazaret door, and the door was scorched and the underside of the deck above it was smoke-stained.

Q. Was the ceiling above burned at all?

A. The under side of the deck?

Q. Yes. A. No.

Q. Was the floor of the upward deck burned at all? A. No.

Q. Was the bulkhead, aside from the door burned?

A. No.

Q. Did you make an examination to ascertain that fact? A. I did.

Q. Have you seen the door recently?

A. Yes, sir.

Q. State whether or not the door, as you saw it, did or did not represent the extent of the fire?

A. That represented the extent of it.

Q. Did you see on the floor of the between-decks anything?

A. I saw a piece of burned gunny-bag there and a

(Testimony of Capt. David Baird.)

lot of water slopped about.

Q. How far from the door was the stowage of the creosote drums? A. About two feet.

Q. Was there any dunnage in that locality?

A. There was no dunnage particularly at the door, but [277—106] further in to the wing some loose wood had been thrown from the end of the drums and was lying on the between-decks.

Q. Was there any dunnage between the drums themselves? A. Yes, sir.

Q. Was there any dunnage between the drums immediately in front of the fire? A. Yes, sir.

Q. What business had you in connection with the investigation of this fire?

A. Well, it was my business to see that the vessel was—if she was damaged, to see that she was repaired—to report to the underwriters of the vessel and have it repaired.

Q. Did you make any such report? A. No.

Q. Did you make a report of any kind? A. No.

Q. Why not?

A. Nothing to report of any importance.

Q. Now, what service did that bulkhead door perform?

A. It was an entrance from the hold into the ship's storeroom.

Q. State whether it was as efficient to perform that service after the fire as before. A. Yes, sir.

Q. Were any other parts of the ship burned?

A. No.

Q. Aside from the bulkhead door?

(Testimony of Capt. David Baird.)

A. No. [278—107]

Q. You have already stated that the door was the only part burned? A. Yes, sir.

Q. How often did you visit the ship while she was there?

A. I was over three or four times. I had other ships here, of course, and I was over there to see that things were going all right.

Q. Did you at any time see the crew of the "Sardhana" pumping creosote out of the hold?

A. Yes, sir.

Q. Do you know how much creosote was in the hold of the "Sardhana"?

A. The captain reported 13 inches.

Mr. BOGLE.—I object as hearsay.

Q. But you saw the crew pumping creosote?

A. Yes, sir.

Q. Where was it being pumped to?

A. It was being pumped into barrels on a scow alongside.

Q. You distinguished barrels from drums?

A. Yes, sir.

Q. Do you know what became of that creosote afterwards? A. No.

Cross-examination.

Q. (Mr. BOGLE.) Do you know of your own knowledge, Captain, how much creosote was in the hold of this vessel when she arrived at Eagle Harbor—loose creosote, of your own knowledge?

A. No. The captain officially reported to me 13 inches.

(Testimony of Capt. David Baird.)

Q. I ask you if you know of your own knowledge. [279—108]

A. No, I do not. I did not sound the well.

Q. Do you know how many barrels were filled with this creosote from the hold? A. No, I do not.

Q. Do you know how many gallons of creosote were in the hold? A. I do not.

Q. Do you know whether all the barrels which were filled with creosote and whether the creosote in these barrels was in fit condition for use, or whether any of it was thrown away? A. I do not.

Q. Captain, you of course did not see this fire aboard the "Sardhana"?

A. I was at home; it occurred during the night.

Q. You saw it next day, about what time?

A. I went over, I should imagine, on the 10 o'clock boat.

Q. Had the crew cleaned up the results of the fire, the water, etc.?

A. There was some water laying around the place; it was wet around there.

Q. Do you know whether they had removed any of the dunnage or stores or anything that was destroyed in the fire? A. I do not.

Q. I understood you to say, Captain, that the creosote drums were about two feet away from the fire?

A. From the bulkhead.

Q. On each side? A. On the foreside.

Q. That is the side away from the side on which the fire [280—109] occurred?

A. No, that is the side on which the fire occurred.

(Testimony of Capt. David Baird.)

Q. How far were these creosote drums away from the fire itself? A. I don't know.

Q. You do not know whether any had been removed?

A. They had not been moved; they were still in the position they were when the vessel arrived.

Q. Do you know at what temperature creosote is combustible? A. No, sir.

Q. This creosote was in drums; there was no loose creosote near the fire? A. No.

Q. Was there any dunnage near the bulkhead where the fire occurred?

A. Yes, there was some dunnage between the ends of the drums and bulkhead at the sides.

Q. Was there any creosote upon this dunnage?

A. I did not see any.

Q. Now, as I understand, you testify that this door was scorched, is that correct?

A. I said the ceiling was smoke-stained and the door was scorched.

Q. You have seen the door, have you not?

A. Yes, sir.

Q. You call that a scorched door?

A. Pretty well scorched.

Q. Pretty well scorched. You would say it was burned, would you not? A. I don't know.

Q. Is not that burned a quarter or half an inch deep? [281—110]

A. What is a burn? Is a burn a scorch or what is it?

Q. That is what we are trying to find out. You

(Testimony of Capt. David Baird.)

say none of the bulkhead was burned. A. No.

Q. Was there any of it scorched within your meaning of that word?

A. No, it was not; the paint was not even blistered.

Q. All just as it was before? A. Yes.

Q. Mr. Tuttle is mistaken if he says any of the bulkhead was burned? A. If he said so he is.

Q. You heard him say so, didn't you?

A. I did not pay much attention. I was looking out of the window.

Q. He was there next day and he saw it?

A. Yes, so was I.

Q. You represented the owners of this ship, didn't you? A. Yes, sir.

Q. Captain, you testified as to the contents of these drums, you testified there was 90 gallons, that is, Imperial gallons? A. Yes, sir.

Q. What would they contain of United States gallons?

A. I suppose a fifth more. In American gallons it would be a little more than a hundred.

Q. Did you make any survey of the fire damage, or just a casual inspection?

A. Oh, I went and surveyed it on my own account to see if anything was required. [282—111]

Q. Did you make any written report of that survey? A. No.

Q. No written report at all.

A. No. I wrote to the owners and told them.

Q. Was it within your duty to see that the freight

due the ship was collected from the creosote company?

A. I suggested that it was time that they were collected, some of it.

Q. There was quite a little unpleasantness about collecting the freight, was there not, between your office and the creosote company?

A. Well, I don't know. I simply suggested that it be collected and I believe it was collected. The unpleasantness did not touch me, if there was any.

Q. You had nothing to do with that? A. No.

Q. Captain, these lighters were fastened to the ship, were they? Lashed tight to the ship with lines, were they? A. You could not lash a lighter.

Q. How fastened?

A. On the inside corner of the lighter they have a line fore and aft, and out to the two outside corners they have a line out to the lighter.

Q. Do you know how many drums of creosote would constitute a load on one of these lighters?

A. No.

Q. Do you know how many drums were on this lighter the night it capsized? A. No.

Q. Did you survey the lighter after it capsized? [283—112] A. Never saw it.

Q. You do not know whether there was any water in that lighter or not? A. I do not.

Q. You do not know anything about the condition of the weather that night? A. No.

Q. Don't know which direction the wind was blowing over there? A. No.

(Testimony of Capt. David Baird.)

Q. What did you mean, Captain, when you stated in answer to counsel in your direct examination, that the lighter could not have capsized under any conditions of weather over there?

A. Well, lying alongside the ship she could not.

Q. She could not? A. No.

Q. Under any conditions of weather. A. No.

Q. You mean any conditions of weather that you think might occur there, or any conditions of weather that might occur any place?

A. Oh, well, a typhoon might come in and blow her ashore.

Q. She would capsize with a good deal less than a typhoon, if heavily loaded? A. I judge not.

Q. You do not know how stable she was when loaded?

A. Well, it takes a good deal to capsize them, let me tell you.

Q. She could not possibly have turned down and listed [284—113] so as to have thrown the creosote overboard without having water in her, that is your opinion? A. That is my opinion.

Q. Do you know whether there was a westerly wind on the night of this accident? A. No.

Q. You had only been over there twice, Captain?

A. I might have been there three times.

Q. What do you base your statement on that a westerly wind is the prevailing wind in that harbor?

A. The prevailing winds on Puget Sound are westerly winds.

Q. You say in the harbor. Does not the shore line

(Testimony of Capt. David Baird.)

affect the direction of the wind somewhat in this harbor?

A. Sure, it does, it is open to the westward and it blows either up or down.

Q. There is no condition of weather which would cause the ship to have considerable motion over sideways, is there? A. No.

Q. Could not have any motion sideways?

A. Not with that wind.

Q. Not enough to cause this scow to capsize?

A. No.

Q. Now, if it appears from examination that this scow had no water in her, then how did she capsize?

A. I cannot tell you how she capsized.

Q. What was the proper method of loading, in your opinion, a scow with creosote drums?

A. The way she was loaded.

Q. It was properly loaded then, was it? [285—114] A. Yes, sir.

Q. Do you know who furnished the scows?

A. No.

Q. Captain, do you know what the conditions of this charter were with reference to delivery of cargo?

A. Well, it is a good long time ago. I have had many things on my hands since.

Q. Do you know whether the ship was free from all liability after the cargo left her tackle?

A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. How do you know that, Captain?

A. I know that—that was in the charter-party;

(Testimony of Capt. David Baird.)

that was the usual clause in every case.

Q. That is the usual clause, but do you know that was in this charter-party?

A. I would not swear at present that it was.

Q. If it had not been in the charter-party then there would have been some responsibility on the part of the ship, might have been for the loss of this creosote?

A. Well, I don't know; I would not admit that.

(Testimony of witness closed.)

Hearing adjourned until Feb. 21, 1913, 10 A. M. [286—115]

Seattle, February 21, 1913.

PRESENT: Mr. BOGLE, for the Libelant.
Mr. McCLANAHAN, for the Respondent.

[Testimony of J. J. Preece, for Respondent.]

J. J. PREECE, a witness called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. McCLANAHAN.) Mr. Preece, you live in Seattle? A. Yes, sir.

Q. You lived here in November, 1908?

A. Yes, sir; I don't live in Seattle; I live in Kirkland, at present.

Q. Where were you living in November, 1908?

A. Living in Seattle.

Q. What was your business in November, 1908?

A. Stevedore foreman.

Q. How long has that been your business?

A. Been that on and off since 1886.

(Testimony of J. J. Preece.)

Q. And you are now engaged in that business?

A. Yes, sir.

Q. Do you remember stevedoring the bark "Sardhana" in November, 1908? A. Yes, sir.

Q. Where was she then? A. Eagle Harbor.

Q. You were foreman of the stevedores unloading her? A. Yes, sir.

Q. What was she loaded with?

A. Creosote in drums.

Q. Do you remember, Mr. Preece, the incident of a lighter of drums being capsized on that occasion? [287—116] A. Yes, sir.

Q. Who loaded that lighter? A. I did.

Q. Do you remember what day of the week it was?

A. Well, if I remember rightly, and I am pretty sure I am right, it was on Saturday.

Q. Was the barge completely loaded or not?

A. Just finished.

Q. Completely loaded? A. Yes.

Q. You refer to the barge that capsized?

A. Yes, sir.

Q. Will you tell how that barge was loaded?

A. She was loaded with drums; on the end stood up one tier, if I remember rightly, then the remainder were stowed athwartships, three tiers, one on top of the other. The first tier laid on the bottom and the next tier drawn in half a drum on each side and then the third tier was the same, to keep them from shifting.

Q. They were laid athwartships on their sides?

A. Yes, sir.

(Testimony of J. J. Preece.)

Q. How far from the side of the barge did the athwartship tier of drums commence, that is, how much margin was there of the barge?

A. About 18 inches on the lower tier.

Q. That is, there was a free deck space of 18 inches before you commenced to lay?

A. Yes, on both sides.

Q. What was the character of the flooring of the barge—smooth or rough? [288—117]

A. Well, it would not be very smooth. I could not tell you exactly whether they had a good deck on it or not.

Q. You don't remember that?

A. It would not be very smooth, anyway. As a rule, these scow decks are pretty rough.

Q. At what time in the afternoon did you finish the loading of the barge?

A. If I remember rightly, it was between four and five o'clock in the afternoon; somewhere around there.

Q. What was the custom of the creosote people with reference to the treatment of loaded barges, what did they do with them?

A. Took a tug and towed them away.

Q. Did they tow this barge away? A. No.

Q. How was this barge attached to the ship?

A. With lines.

Q. How were these lines fastened and where were they fastened to?

A. Two lines, breast lines to hold it into the ship and a head line and a stern line to keep her from

(Testimony of J. J. Preece.)

going fore and aft, attached to the ship.

Q. How long was that barge?

A. The barge would be 75 or 80 feet, I should judge.

Q. What was the beam?

A. I could not tell you exactly how long but somewheres about that. The beam would be about thirty feet.

Q. What part of the bark was she attached to?

A. Right at her main hatch, about amidships.

Q. How high would the deck of the bark be above the deck of [289—118] the lighter?

A. Well, I do not remember at what stage of the discharging we were on when that barge capsized.

Q. I do not care to have you give it exact, but just approximately.

A. You mean the deck of the bark under the rail?

Q. How high was the deck above the deck of the lighter, approximately? A. At that time?

Q. Yes.

A. Seven or eight or nine or ten feet.

Q. How high would the three tiers of loaded drums on the lighter bring that?

A. Fetch it pretty well up—pretty well up to the rail.

Q. Pretty well up to the rail of the bark?

A. If I remember rightly, that particular scow itself was pretty well up. I think we could step right from the rail and jump on the loaded barge, but I will not swear to that.

Q. You did not see this lighter capsize, did you?

(Testimony of J. J. Preece.)

A. No, sir.

Q. When did you first learn of it?

A. I learned of it Monday morning when I went back to Eagle Harbor.

Q. At which side of the bark was she moored when you left Saturday night?

A. She was moored on the port side.

Q. Where did you have your donkey-engine?

A. On the starboard side.

Q. Did you see the capsized lighter the next morning, [290—119] Monday morning, and were the lines still attached to her?

A. I have been thinking this thing over about that capsizing of the barge, and it seems to me, as I see it now, that the barge had been towed away from the ship and tied up to the end of the dock.

Q. When you saw it.

Q. I am pretty sure that is where I saw it. I have been trying to think where that barge was, and I am pretty certain she was tied at the end of the dock, towed out of the way, so that we could go to work Monday morning. I am pretty certain she was tied up to the end of the dock.

Q. You have had considerable experience loading barges? A. I have loaded quite a few of them.

Q. How great has been your experience?

A. I discharged four cargos of creosote right in Eagle Harbor, one after the other, and I have loaded barges alongside vessels here for years.

Q. In your opinion, would it be possible for that barge to capsize fore and aft? A. No.

(Testimony of J. J. Preece.)

Q. In your opinion, considering the situation of the bark and the lighter in Eagle Harbor at the time, would it have been possible for that lighter to have capsized through any stress of wind or sea?

Mr. BOGLE.—I object as calling for an opinion of the witness, and the witness is not qualified.

A. If there was sea enough came in there, she might capsize, but the way the vessel was lying and the way the barge was alongside, I don't believe any sea ever came [291—120] in there that would capsize that barge, provided that there was no water in her, she was not leaking.

Q. Did you, Mr. Preece, know of a fire that took place on board of the bark while you were there discharging her? A. I knew of it, yes, sir.

Q. You were not present at the time of the fire, were you? A. No.

Q. Where were you—on shore?

A. I was ashore in my room; gone to bed.

Q. Did you subsequently see the extent of the fire?

A. Yes, I saw where the fire had burned.

Q. Where was it?

A. Right aft, forward of the lazarette, between the creosote tanks and the bulkhead of the lazarette, in the between-decks.

Q. At the time of the fire had any of the creosote drums adjacent to the bulkhead been discharged?

A. No, sir.

Q. What was the distance from the ends or sides of the drums to the bulkhead?

A. I should judge about two feet.

(Testimony of J. J. Preece.)

Q. Not more than that?

A. I hardly think it would be more.

Q. And you discharged these drums eventually, did you? A. I discharged them.

Q. When you saw the effects of the fire, what was it?

A. Well, the door was burned, charred about that width. (Showing.)

Q. You are stretching your hands now.

A. About three feet, three feet six or four feet at [292—121] the most. That was charred pretty heavy at the bottom, and as it went up higher it was little; it went up about five feet. Then the deck above was all blackened with smoke, and the paint work was blistered, but there was nothing there.

Q. Was the floor burned? A. No.

Q. Have you seen the door of the "Sardhana" in the courthouse in this city?

A. I have seen a door they say is the door of the "Sardhana." It looks like the one burned. I could not swear to it, because I do not know that it is. It is identical with it, if it is not. It looks like it to me.

Q. When you inspected that door, did you recognize the extent of the fire that you had seen on the "Sardhana"?

A. Just the same. I am satisfied in my mind that is the door of the "Sardhana."

Q. Are you satisfied in your own mind that represents the extent of the fire?

A. Yes. That represents the extent of the fire. But the bulkhead, there is more smoke and blisters

(Testimony of J. J. Preece.)

around on the deck above, that was blistered, the paint work was blistered.

Q. But the fire is represented by that door?

A. Yes, sir. That is all that was burned.

Q. Who are you employed by now?

A. The Washington Stevedoring Company, Captain Gibson.

Q. You have no interest in this litigation?

A. No. **[293—122]**

Cross-examination.

Q. (Mr. BOGLE.) When did you inspect this door? A. I have seen it this morning.

Q. When did this fire occur on board the "Sardhana"? A. The date of it?

Q. The date of it. A. I cannot give the date.

Q. Can you give the month and year?

A. They have the records when that happened. I haven't got the dates.

Q. Do you remember the year?

A. About four years ago, as near as I can remember. I do not keep dates in my head.

Q. Mr. Preece, have you a very clear recollection at this time as to the extent of the damage done aboard the "Sardhana" by this fire? A. Yes, sir.

Q. Very clear? A. Very clear, yes, sir.

Q. Still, you do not remember the month or the year in which the fire occurred?

A. No, I cannot say that I remember the year or the month. I am going around the Sound here from one place to another discharging ships, and I do not keep it in my memory.

(Testimony of J. J. Preece.)

Q. Been pretty busy in the last four or five years?

A. Yes, pretty busy.

Q. How does it happen that your recollection of this fire and the damage it done is so clear?

A. Well, I happened to know that I discharged the "Sardhana" [294—123] there, and I know that the fire was there, because I saw it, and I heard the alarm given in the first place from my room. And when I got aboard the ship the next morning they told me the fire had been there, and I looked at the bulkhead, and when the cargo was discharged from the between-decks I had as good opportunity as anybody to examine that bulkhead, because it was all open to me then. Before that a man had to crawl in there for practically 25 or 30 feet on his belly on top of the dirty creosote drums, and a man is not apt to do that. I saw it after it was discharged.

Q. What was the extent of the damage to the bulkhead? A. To the bulkhead?

Q. Yes. The bulkhead itself.

A. No damage at all.

Q. No damage whatever to the bulkhead?

A. No, none at all.

Q. You will swear to that, will you?

A. Yes, sir.

Q. But the door you will admit was burned, having seen it this morning?

A. I knew that the door was burned then.

Q. Don't you testify now largely from the inspection of the door this morning and not from your recollection of the fire?

(Testimony of J. J. Preece.)

A. No, I testify from my recollection of the fire.

Q. Do you know that this fire occurred in November, 1908?

A. I know that I have not got the dates, as I tell you, but I know that the fire occurred aboard the "Sardhana" when she was lying in Eagle Harbor discharging. **[295—124]**

Q. And that the bulkhead was not burned?

A. Not at all.

Q. Was it charred?

A. Well, blackened around there, that is all. Probably smoked. You must understand creosote will cause quite a lot of smoke, and black smoke at that, and the deck and the paint work around there was blistered. There was only that much space between the drums and the bulkhead where the fire was, about 2 feet. There was room enough for a man to go down in there.

Q. You say the distance you are measuring off there?

A. As near as I can remember it was very little over two feet. That is as near as I remember, and I discharged the ship.

Q. Mr. Preece, is it not possible to have gotten from the lazarette door, in forward from the lazarette door to this fire? A. Yes, sir.

Q. You would not have to do any crawling on your belly to do that?

A. Not if you went through the lazarette. I did not have a key to the captain's cabin. I did not

(Testimony of J. J. Preece.)

go through that way. It was pretty dark in there then.

Q. You did not go aboard when you heard the alarm that night? A. No.

Q. Did not get up at all?

A. I got up; in fact, I had not gone to bed, but I was just going to bed when I heard the bells ringing and heard them singing out. [296—125]

Q. Quite a little commotion around there.

A. There was for a few minutes; yes.

Q. You mean a few minutes?

A. The noise, as far as I could hear it, was over in a few minutes.

Q. What do you mean by a few minutes?

A. The first thing I heard was bells, fire-bells, ringing, and then I heard some people calling out, and I was under the impression that the steamship "Cornelian," which was lying off the shore, I seem to remember that I could hear the rattling of the windlass, and I was under the impression that the longshoremen or someone went from the "Cornelian" to the "Sardhana."

Q. For what purpose?

A. I supposed to put out the fire, whatever the trouble was. I did not know what the trouble was.

Q. How far was the "Cornelian" lying from the "Sardhana"?

A. Oh, she might be a couple of hundred yards. I do not think it would be any more.

Q. In order to get from one ship to the other they would have to lower the boats and row over?

(Testimony of J. J. Preece.)

A. They might have had a boat overboard for all I know.

Q. There was no way of getting along the dock; neither vessel was at the dock?

A. There was no way of getting from the "Cornelian" to the "Sardhana" without a boat or some raft or something. They always had a boat lowered.

Q. Did you personally inspect the loading of this barge on Saturday? A. I loaded her. **[297—126]**

Q. How many drums of creosote did she have fully loaded?

A. Well, I could not tell you to the drum; we loaded them to orders from the creosote company. They told me to put on so many drums. To *them* the drums three tiers high. Put them on providing she was not getting too deep. Mr. Beale was the superintendent, and when they brought it out they would tell so many tiers, and I would put them on.

Q. When this scow was completely loaded on this night, when you had finished, did you know how much water she was drawing? Did you know how far her deck was above the water?

A. I know she had all the way from a foot to 18 inches of freeboard, when I left her.

Q. Was she moored alongside, close to the "Sardhana"? A. Right close up; yes.

Q. So that she was touching the hull of the vessel?

A. She was alongside the yard-arm here; this swung out right over the scow.

Q. Would the edge of the barge be under the curve of the vessel's hull? A. The deck of the barge?

(Testimony of J. J. Preece.)

Q. Yes, sir.

A. Some of that might be and some might not.

Q. Was this one?

A. I could not say that it was. I could not say that it was not, but I don't think it was.

Q. You do not know, then?

A. I know that they build barges that way. I cannot swear whether that barge was curved or not or straight. **[298—127]**

Q. I say, was the deck of the barge under the curve of the counter of the vessel?

A. No, she was not under the counter at all.

Q. You are sure of that, are you?

A. I am sure of that, yes.

Q. Mr. Preece, in unloading these numerous other vessels at Eagle Harbor that you have spoken of, did you use these same barges in unloading these vessels?

A. Yes; I guess they might have been the same barges. They were hired barges. I did not have to keep track of the barges. All I done was to load them. Probably the same barges.

Q. When you knocked off work that Saturday night, did you notice whether that barge was leaking?

A. No, I left the barge; she was right up—upright on an even keel.

Q. Was she deeper in the water than barges usually are when loaded to that extent?

A. Not necessarily so.

Q. So if leaking was the cause of the barge sink-

ing she must have sprung a leak during the night?

A. Not necessarily. She might have been taking water when we got her down so far. It might have been up pretty well and when we got her loaded down to the mark she would begin to leak and the water run in.

Q. You are not testifying that she was leaking, are you?

A. I am not testifying that she was leaking; no.

Q. When you saw her the next morning—or Monday morning? A. It was Monday morning.

Q. You think she was moored, then, to the dock?

[299—128]

A. I think she was moored to the dock. I will not swear to it.

Q. Was she upright?

A. No, she was bottom up.

Q. Was she standing high out of the water?

A. No, she was low in the water.

Q. Very low in the water?

A. Very low in the water.

Q. Any indications of any water being in her?

A. To me she looked full.

Q. She would be very low in the water if she was full? A. She was low in the water.

Q. What do you mean by low in the water? How high was she out of the water?

A. The bottom of her might have been a little more than flush with the water, very little more.

Q. You are sure of that, are you?

A. I am sure of that; yes.

(Testimony of J. J. Preece.)

Q. Of course, Mr. Preece, you do not know about the sinking of this barge?

A. I don't know anything about it. Only I left on Saturday night and the barge was all right, and when I came back Monday morning the creosote was in the bottom of the bay. That is all I know about it.

Q. You are familiar with the construction of these barges, are you? A. Some, yes.

Q. Were there any holes on the barges that would let water in if she was upside down? A. Yes, sir. [300—129]

Q. If she was capsized she would take water then?

A. I don't say she would not. I said she was full of water.

Q. That is really all that you know about it, as she was moored to the dock on Monday morning.

A. Yes, sir.

Q. And your other testimony here is mere speculation. You do not know know anything about what caused her to capsize, do you?

A. I do not know what caused her to capsize.

Q. Do you know what the weather was on the night she capsized?

A. I know how the weather was in Seattle; yes.

Q. You were in Seattle that night, were you?

A. Yes, sir.

Q. Do you know how the weather was in Eagle Harbor?

A. I do not know how the weather was in Eagle Harbor.

Q. Where were you in Seattle that night?

(Testimony of J. J. Preece.)

A. Home.

Q. Where is that? A. On Queen Anne Hill.

Q. You do not know how the weather was on the bay that night, do you?

A. No, but I know it was rough that night here in Seattle on this waterfront here.

Q. Do you know from which direction the wind was coming?

A. No. I know that it damaged vessels and scows lying alongside the docks in Seattle on the waterfront.

Q. Some extremely heavy weather, was there not?

A. Quite a little blow on that night.

(Testimony of witness closed.) [301—130]

[Testimony of C. R. Yeaton, for Respondent.]

C. R. YEATON, a witness called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. McCLANAHAN.) Mr. Yeaton, you are an Englishman, are you? A. Scotch.

Q. What is your business or occupation?

A. Second mate.

Q. Of what?

A. Of the British steamer "Oteric."

Q. Where is the steamer now? A. Pier 5.

Q. In this city? A. Yes.

Q. When did you arrive here?

A. I have forgotten that—Tuesday.

Q. Of this week? A. Yes.

Q. Were you ever connected with the bark "Sardhana"? A. Yes, sir.

Q. What was your position on the bark "Sard-

(Testimony of C. R. Yeaton.)

hana"? A. Apprentice.

Q. Were you an apprentice on the "Sardhana" at the time she was at this port, in November, 1908?

A. In Eagle Harbor, yes.

Q. At Eagle Harbor? A. Yes.

Q. Did you make the voyage from London on her?

A. I did.

Q. What was her cargo at that time?

A. Creosote, in drums. [302—131]

Q. During the voyage from London to Eagle Harbor, was there any creosote pumped out of the hold or limbers of the ship, into the sea? A. None.

Q. After arrival at Eagle Harbor, was there any creosote in the hold of the vessel? A. Yes, sir.

Q. How much?

A. I could not tell you for certain, but I believe about a foot.

Q. Did you have anything to do with pumping that creosote out? A. Yes, sir.

Q. What did you have to do?

A. Pumped it.

Q. You, yourself? A. Personally.

Q. State how much of that creosote was pumped out.

A. The only way I could state was giving you the approximate number of days we pumped.

Q. I don't mean that. Was it all or less than all pumped out?

A. Until the pumps sucked; they would not draw any more.

Q. Was there anything done after that to what re-

(Testimony of C. R. Yeaton.)

mained? A. I could not say for certain.

Q. How many days, do you recollect pumping creosote out of the hold? A. At least four.

Q. Was this pumping done after the discharge of the drums, or during the discharge of the drums? [303—132]

A. Towards the latter part of the discharging.

Q. Where was that pumped to?

A. Into empty barrels on the scow.

Q. Where did these barrels come from?

A. From the creosote company, to the best of my knowledge.

Q. Where was the scow taken after that, after the barrels were filled?

A. To the customary place of discharge, as far as I know.

Q. Have you any idea of the number of barrels that were pumped out?

A. No, I haven't—I know from seeing, but I did not count them.

Q. Were there many or few? A. Many.

Q. Mr. Yeaton, do you remember the occasion of a lighter on which were creosote drums, capsizing?

A. Yes, sir.

Q. Where were you on the night that the lighter capsized? A. On board.

Q. Do you know when she capsized?

A. Early in the morning; that is all I know.

Q. How did you have knowledge of her capsizing?

A. I heard it go.

Q. You heard what?

(Testimony of C. R. Yeaton.)

A. I heard her turn, what I supposed to be her turn.

Q. What was the noise like?

A. It sounded to me like drums hitting the ship.

Q. How long did the noise last?

A. A few seconds.

Q. Was the ship in any stress of weather at the time? [304—133]

A. Not that I could see; not that I remember.

Q. What kind of a harbor was this where the "Sardhana" lay, exposed or protected?

A. There is quite a little bay, but it is quite sheltered from the Sound itself, only a narrow entrance.

Q. Was this lighter which was capsized in an exposed or a protected position?

A. Well, from anything coming in from the Sound she was sheltered.

Q. Was it exposed to anything else, was it exposed to any sea or wind?

A. Just the amount of sea that could get up in the bay, that is in Eagle Harbor.

Q. Was the lighter lying close to the "Sardhana"?

A. Yes, sir.

Q. Do you know how she was fastened to the ship?

A. I could not give you the exact—

Q. Was the barge fastened to the ship?

A. She was fastened.

Q. With what? A. Ropes.

Q. Lines run out? A. Yes, sir.

Q. Did you see the capsized lighter the next morn-

(Testimony of C. R. Yeaton.)

ing? A. I did.

Q. Were these lines still to her? A. Still to her.

Q. Can you tell from the fact which you have just stated which way the lighter capsized?

A. Well, I should imagine towards the ship. [305—134]

Q. Were the lines intact when you saw them?

A. When I got out in the morning they were still intact.

Q. If she had capsized over from the ship, how would the lines have been? A. Probably broken.

Q. Do you remember the incident of the fire on board the "Sardhana"? A. Well.

Q. Did you have anything to do with the fire?

A. Yes, I did some work about it.

Q. What was the work?

A. Passing water to put it out.

Q. Where was this water passed from?

A. Ship pump.

Q. Where was the ship's pump located?

A. On the forward end of the ship.

Q. Where was the water passed to?

A. Through the saloon down into the lazarette.

Q. Through the saloon down into the lazarette?

A. Yes.

Q. Did you subsequently find out where the fire was? A. Yes, sir.

Q. And you saw it, did you? A. And saw it.

Q. During the progress of the fire, did you see the fire? A. No.

Q. What was it that you did see?

(Testimony of C. R. Yeaton.)

A. Smoke coming out from the saloon.

Q. Do you remember the occasion of fire-extinguishers being brought aboard the ship? [306—135] A. I do.

Q. Did you have anything to do with them?

A. I helped a man to get them over the rail.

Q. Did you do any work with your water buckets after that? A. I could not say.

Q. From the time of the alarm to the time when you ceased work on the fire, how long was it?

A. I could not exactly say.

Q. Do you know whether these extinguishers were used on the fire itself?

A. I did not see them after coming over the rail.

Q. You did not see them after they came over the rail. Was it a dark night? A. Yes, fairly dark.

Q. When did you see the fire itself?

A. Well, I could not say that I saw the fire myself.

Q. When did you see the result of the fire?

A. That night I went down in the lazarette, but I did not see much of it then, it was too dark.

Q. When did you actually see the result?

A. Oh, frequently afterwards.

Q. Frequently after that? A. Yes, sir.

Q. Did you see it after that when the cargo was out? A. Yes, sir.

Q. What was the extent of the fire as you saw it?

A. Merely the door charred.

Q. You have seen the door, have you, Mr. Yeaton?

A. I have.

Q. In the courthouse in this city? [307—136]

(Testimony of C. R. Yeaton.)

A. Yes, sir.

Q. Is that the "Sardhana's" door?

A. To the best of my knowledge, yes.

Q. Does or does that not represent the extent of the fire? A. As far as I ever saw it, yes.

Q. Was the ceiling or the under part of the deck burned at all? A. No.

Q. Was the floor of the between-decks burned at all? A. No.

Q. Was the bulwark burned at all other than the door? A. The bulkhead?

Q. The bulkhead, I mean.

A. No, not that I saw.

Q. How many times did you see that after the fire itself?

A. I should say daily for quite a long time. My work took me down there practically every day.

Q. Were there any repairs ever made to the fire damage? A. None.

Q. Were any repairs ever needed?

A. Well, I should say no, because if there had been any they would have had them done to save the ship's stores.

Q. This door protected the stores from pilferage?

A. Yes, sir.

Q. When do you sail from here, Mr. Yeaton?

A. To-night.

Q. Until you arrived here, you had not heard of this litigation, had you? A. No, not at all.

Q. How long were you on the "Sardhana" after she left Eagle [308—137] Harbor?

(Testimony of C. R. Yeaton.)

A. About two years, I should think.

Q. When you left her, there had been no repairs made of the fire damage? A. None.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Yeaton, state if you know when this door was removed from the "Sardhana."

A. I beg your pardon?

Q. When was this door which was at the Federal building removed from the "Sardhana"?

A. I do not know; I did not know it was removed until I saw it here.

Q. It was still on the "Sardhana" when you left?

A. Yes, sir.

Q. In the same condition as it was after the fire?

A. Exactly.

Q. Is it not a fact that a good portion of the charred portion of that door had been scraped off? Cannot you tell that from an inspection of the door itself? A. I did not notice that.

Q. You did not notice that any charred portion had been scraped off? A. I did not notice it.

Q. Did you make a careful examination of that door this morning?

A. I went to look at it, and I chiefly looked at it to see if it was the door.

Q. Where did these fire-extinguishers come from, where were [309—138] they obtained?

A. They were brought by the creosote people.

Q. From the creosote company's plant?

A. Yes, sir.

Q. At the time these fire-extinguishers were

(Testimony of C. R. Yeaton.)

brought aboard, was the smoke still coming out of the ship? A. Probably, I think.

Q. How long after the fire-alarm was sounded was it before you went below to see the fire?

A. I did not go below until it had been extinguished.

Q. How long was that after the fire began?

A. That would be some time.

Q. Do you know who discovered the fire?

A. I believe the watchman of the ship.

Q. This fire was below-decks, was it not?

A. Between-decks.

Q. The watchman's duty is principally on the main-deck, is it not? A. Yes, sir.

Q. Do you know how he discovered this fire?

A. Probably saw smoke come floating up the ventilators.

Q. You do not know how long this fire had been burning when it was discovered by the watchman, do you? A. No.

Q. The watchman discovered the fire and immediately gave the alarm, did he? A. Yes, sir.

Q. Was that alarm responded to by any outside persons? A. Yes, subsequently.

Q. Well, naturally, it would be subsequently. [310—139] Who responded, what persons responded to this fire-alarm, if you know? I do not want you to give the names of the persons, but where did they come from, if you know?

A. There were several ships lying in the bay, laid up for the winter.

(Testimony of C. R. Yeaton.)

Q. Do you remember how the ships laid?

A. I know one that was there loading. That was the "Cornelian."

Q. Was the "Jupiter" lying in the harbor at that time?

A. The "Jupiter" was there. I know there were some of the "Jupiter's" men aboard.

Q. They came aboard and assisted in putting out the fire?

A. Yes. I think their work consisted mainly in passing water. I do not know whether they were down below or not.

Q. Did any of the crew of the "Hornelia" come aboard to assist? A. Yes, sir.

Q. And they assisted in some manner, did they?

A. Yes, sir.

Q. I understood you to say some of the employees of the creosoting company came aboard with the fire-extinguishers. A. Yes, sir.

Q. Could you tell me approximately the number of men who were engaged in extinguishing this fire?

A. Well, probably around about a dozen, possibly more.

Q. How many were below, do you know?

A. I could not say. I was not below myself. Probably four or five.

Q. Do you know how long they were engaged in passing water down to put out this fire, before the extinguishers arrived? [311—140]

A. No, I could not say any nearer than probably the time it would take for to go to the plant and get

(Testimony of C. R. Yeaton.)

the extinguishers and take them down the wharf and get a boat and fetch them out.

Q. Cannot you give us an approximate amount of time it would take? You say there were 12 men engaged in passing this water? A. Not all the time.

Q. Did the crew of the "Jupiter" get aboard before the fire-extinguishers arrived?

A. I could not say as to that.

Q. Where was the "Jupiter" lying with reference to the place that the "Sardhana" was lying?

A. Astern of us.

Q. Approximately how far distant?

A. Three hundred feet, perhaps.

Q. Do you know how they reached the "Sardhana"? Was it necessary for them to lower a boat and row over? A. They always had a boat down.

Q. It was necessary for them to come over by boat?

A. You could probably come by logs, if you were good at it.

Q. Have to be pretty good at it, at night, would you not? Do you know how they did come?

A. I should say by boat.

Q. Where was this other ship, the "Hornelian," lying in the harbor with respect to the place the "Sardhana" was anchored?

A. Nearer the entrance to the harbor.

Q. I mean about how far distant?

A. Probably about as far as the "Jupiter."

Q. The crew from that vessel would also have to take a boat [312—141] to get to the "Sardhana,"

(Testimony of C. R. Yeaton.)

would they not? A. Yes.

Q. Have you any idea how long it took the crews of these two vessels to get the boats and row over to the "Sardhana" and get aboard?

A. No, I could not say.

Q. How many men were engaged passing water, prior to the time that the crews of these other vessels arrived to assist?

A. Well, all our crew was on board; probably would be a dozen.

Q. In passing water? A. Yes, sir.

Q. And I understood you to say these other crews assisted you in passing water when they came aboard? A. Yes.

Q. How many were there from these other two vessels? A. About a dozen.

Q. So that there would be about 24 men passing water after the crews arrived?

A. There would be 24 on board. I do not know whether they were all doing what they came to do.

Q. They were all assisting in the general work trying to extinguish the fire?

A. They were aboard with that intention.

Q. Have you any idea how many buckets of water were passed down into the "Sardhana" for the purpose of extinguishing this fire?

A. No, I could not say. It is quite a slow process passing it along the deck and down. [313—142]

Q. Would you say forty or fifty buckets?

A. I would not like to say. It would take a long time to pass fifty buckets along and pump it.

(Testimony of C. R. Yeaton.)

Q. I just want to get at it approximately, say forty buckets.

A. Probably forty. I would not say. That is, passed down. I don't know what they did with it when they got it below.

Q. Was the smoke still coming out of this vessel when the fire-extinguishers arrived?

A. Probably, I should think; but I could not say.

Q. These fire-extinguishers were immediately sent down below, were they?

A. I presume so, although I did not see them go.

Q. Mr. Yeaton, was there not a considerable amount of dunnage from the "Sardhana" along the bulkhead door, in the immediate vicinity of this fire?

A. I cannot say that I know. There might have been some, but that door was a solid door, and had there been much dunnage there, it would have got jammed and would not slide.

Q. I do not quite follow that.

A. The door slides.

Q. But the burned side of the door would not prevent it sliding?

A. The dunnage would have prevented that.

Q. Mr. Yeaton, did you mean to testify that there was no damage whatever to the bulkhead?

A. I never saw it.

Q. I say, do you swear that there was no damage to the bulkhead?

A. It might have been smoked, but I never saw any trace of [314—143] burning on the bulkhead.

Q. Was it smoked?

(Testimony of C. R. Yeaton.)

A. It might have been. I could not swear that it was or that it was not.

Q. Is it not a fact, Mr. Yeaton, that that fire was approximately four years ago? Now, have you a clear recollection of the damage that was done?

A. Oh, I think so.

Q. Of course, your recollection is very clear because you inspected the door this morning?

A. No, but the fire *in* down there was very clear. It was the only fire that I had ever come in contact with at sea, so I remembered it.

Q. It is very vivid in your recollection, is it?

A. Yes, it is vivid.

Q. Considerable danger to the ship at the time, was there?

A. Well, anything like that aboard ship, getting along without much ado, generally causes excitement, of course.

Q. Your recollection is not clear enough to state whether the bulkhead was even smoked or not?

A. No. It might have been smoked more or less; but probably I would not take any notice of it there.

Q. But you think it was not burned?

A. I certainly remember clearly that the door was burned.

Q. There is no dispute about that.

A. But I mean to say I have been so all along; had the bulkhead been burned I would have remembered that too.

Q. That is what you are basing your testimony on at this time, is it? A. On what? [315—144]

(Testimony of C. R. Yeaton.)

Q. The fact that you remembered that the door was burned, you think that you would have remembered that the other was burned if it had been?

A. Well, we were down there. Of course, we could get in there any time and ascertain what the damage was out of curiosity.

Q. Can you swear at this time that the bulkhead was not burned to any extent? Can you swear that at this time?

A. Well, I would not like to swear that there was no damage done to the bulkhead.

Q. Would you swear that the ceiling was not smoked and blistered?

A. No, I would not swear that the ceiling was not smoked.

Q. Would you swear it was not blistered from the flames and the heat of the fire?

A. No, I would not swear to that.

Q. Do you know what was done with this creosote when it was pumped out of the ship into barrels?

A. No. I presume they took it to the customary place where they took all the scows and discharged it there.

Q. You do not know what was done with it?

A. Oh, no.

Q. Approximately how many barrels were filled with this creosote from the hold of the ship?

A. I don't know.

Q. Haven't you any idea at all?

A. No. I just used to look over the side and see how they were getting along with our pumping, etc.

(Testimony of C. R. Yeaton.)

My position then entailed no responsibility as to price or quantities. [316—145] All we had to do was to pump. When I was told to stop I stopped.

Q. Have you any idea how many gallons you pumped out of the hold? A. No.

Q. Did you state that there were more or less than four thousand gallons pumped out of the hold of that ship? A. No. I could not say.

Q. Did you have charge of the pumps on the entire voyage across? A. No.

Q. Was the pump used at all on the voyage across?

A. Not at all.

Q. You are positive of that, are you?

A. Except that probably the carpenter turned it over to oil it.

Q. But you are sure that no water or creosote was pumped out of it during the voyage across?

A. Yes.

Q. You had pretty rough weather on that voyage?

A. We generally do on a voyage of that length.

Q. Shipped considerable water aboard, didn't you?

A. You cannot very well go to sea without getting it. I would not say there was any especially heavy weather that I remember of. Not any worse than any other voyage.

Q. There was enough rough weather to break the cargo loose in the hold? A. Yes, certainly.

Q. So that it worked pretty heavily?

A. All I could say about it was that it is the ordi-

(Testimony of C. R. Yeaton.)

nary [317—146] Cape Horn voyage.

Q. Would the fact that the cargo was broken loose in the hold of the vessel—

A. It certainly worked a little.

Q. Did it break loose and work so that it had to be restowed and dunnaged?

A. We certainly dropped dunnage down; we did not do any restowing, we could not restow.

Q. Mr. Yeaton, how was this scow fastened alongside? Was the side of the scow up against the hull of the vessel?

A. Just what you would call alongside.

Q. Was it touching the vessel?

A. Not all the time, I should imagine. Just the way a scow lies to a ship—sometimes alongside and sometimes a little bit off.

Q. What was the condition of the weather on the night this scow capsized?

A. I have no particular recollection of it being either very bad or very fine.

Q. Have you any particular recollection at all what the weather was? A. No.

Q. You do not remember?

A. No. Had it been bad I should think I would remember it, because we probably would have had trouble with our own mooring.

Q. Do you know which way this scow capsized, beyond the fact that you heard something hitting the side of the vessel? A. No.

Q. Do you know whether or not this scow itself was bumping [318—147] into the vessel on that

(Testimony of C. R. Yeaton.)

night? A. No, I could not say.

Q. If the scow was moored alongside the vessel and there had been any considerable swell, she would naturally bump the vessel, would she not?

A. Quite probably.

Q. Do you know whether this scow took any water before she capsized? A. I could not say.

Q. Did you make any examination of the scow afterwards? A. No, merely looked at it.

Q. Do you know whether any repairs were made to this scow to her bottom? A. No.

Redirect Examination.

Q. (Mr. McCLANAHAN.) What would have been your duty that night of the capsizing of the scow had the weather been bad?

A. In regard to the ship or scow?

Q. In regard to the ship.

A. Well, had the ship been ranging at all, we might have had to tighten up some of our moorings.

Q. You would not have been in your berth, would you?

A. Oh, well, of course it all depends on how the ship behaved. If she showed any signs of ranging—

Q. Suppose there had been a heavy gale and a heavy sea, what would have been the situation on board the "Sardhana" that night?

A. It would have been just the same unless she started to [319—148] range.

Q. In your judgment, was it possible to have a heavy sea such as would affect that lighter as she lay there that night?

(Testimony of C. R. Yeaton.)

A. Personally, I did not see any heavy sea anywhere around.

Q. That is all you can say? A. That is all.

Q. (Mr. BOGLE.) Mr. Yeaton, the extended protest, Libelant's Exhibit "L," which is signed by the master and first mate, under oath, appears this entry: "June 6th. Nothing to be noted here occurred until when it was discovered that the carpenter's sounding rod was very slightly colored with creosote." Do you remember that incident?

A. No.

Q. Have no knowledge of it?

A. No. That would not come under my notice at all.

Q. Do you know whether or not there was any creosote in the hold of the ship at that time, June 6th, 1908?

A. I probably heard it around the ship; that would be all.

Q. That creosote was allowed to remain in the hold of the ship for the entire voyage, was it?

A. It must have been. It certainly did not come from the pumps.

Q. What does the entry mean "that she had pumps, lights and lookout carefully attended to"?

A. The carpenter would attend to the pumps, turn them over and oil them.

Q. That is what the entry means, that he turns the pumps over every day to oil them? [320—149]

A. Not every day.

Q. Every time?

(Testimony of C. R. Yeaton.)

A. Once a week, and attend to the necessary parts of it.

Q. Was it your custom to turn them over more than once a week? A. I don't think so.

Q. If that entry appears in the log from day to day, would you say it had the same meaning?

A. I should say so, yes.

Q. And if that entry appears from day to day it means that he turned the pump over and oiled it on each one of these days? A. I suppose so.

Q. Is it not customary to pump a vessel on a long voyage, the length of the voyage taken by the "Sardhana" on this occasion?

A. If it is necessary.

Q. According to your testimony, it was not on this occasion, is that it?

A. Well, it was never my position to decide when it was necessary or when it was not.

Q. Do you think you are in a position to testify that it was not done?

A. Well, I know it was not done.

Q. You know that no pumps were used on this voyage? A. I know that.

Q. If the mate stated differently he is wrong?

A. I should say so, yes, sir.

(Testimony of witness closed.) [321—150]

[Testimony of S. B. Gibbs, for Respondent.]

S. B. GIBBS, a witness called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. McCLANAHAN.) Captain, what is your profession?

(Testimony of S. B. Gibbs.)

A. Agent and surveyor for the San Francisco Board of Marine Underwriters.

Q. What is your profession?

A. Shipmaster.

Q. Have you seen sea service? A. I have.

Q. How much? A. About 26 years.

Q. The respondent in this case is a member of this Marine Underwriters of San Francisco?

A. Yes, sir.

Q. Do you remember the fire in question in this case? A. I do.

Q. Did you ever have occasion, after the fire, to investigate it?

A. I went aboard several days after the fire out of curiosity not *know* at the time that our underwriters were interested. I went aboard out of curiosity to see what the fire was.

Q. Who was with you? A. Mr. Walker.

Q. Frank Walker? A. Frank Walker.

Q. Have you seen the door that purports to be the door of the "Sardhana" in the courthouse in this city? A. I have.

Q. Does it assist any, seeing the door, does that assist [322—151] your recollection in regard to the fire, or have you an independent recollection?

A. Well, I think I have an independent recollection as regards the fire.

Q. What did you find to have been the damage caused by the fire, the extent of the fire damage?

A. When I looked at it, the bulkhead appeared to be scorched or charred for a distance of about—that

(Testimony of S. B. Gibbs.)

is, the door. The upper portion of the bulkhead was smoked to the deck and the iron beam overhead was smoked, that is all the damage that I saw.

Q. How often have you been to Eagle Harbor?

A. I go there on an average of about twice a month.

Q. How long have you been going there on an average of twice a month? A. Eleven years.

Q. You remember, do you, distinctly where the "Sardhana" was moored? A. I do.

Q. Did you see any of the scows that were being loaded with drums of creosote?

A. I saw them as I passed by on the steamer.

Q. Did you notice the method of stowage?

A. I did not notice that particularly.

Q. Have you heard the method of stowage described by Mr. Preece, the stevedore, in this case?

A. I have.

Q. Have you heard the evidence as to the location of the lighter that was capsized?

A. I have. [323—152]

Q. State whether the harbor of Eagle Harbor is protected or unprotected.

A. We look upon it as a protected harbor.

Q. Are there any winds or is there any sea, that would have affected this lighter, as she lay alongside the "Sardhana"?

A. I do not think she would have been affected by any wind or sea in that position in which the ship was moored, and the barge moored on the inshore side.

(Testimony of S. B. Gibbs.)

Q. Why, Captain?

A. Because it is close in to land on one side and the ship on the outside, and the creosote works on the other side, and it seems to me pretty hard for the wind to get up any sea that would affect the barge.

Q. What, in your opinion, would cause the capsizing of that barge?

A. I should say it must be water in it.

Q. That is the barge must have had water?

A. The barge must have had water, must have been leaking.

Q. Were you present at any time during the discharge of the "Sardhana"?

A. Only the day that I went on board.

Q. Were they discharging then? A. Yes, sir.

Q. Do you remember whether they were pumping creosote?

A. No, I did not see them pump any creosote.

Cross-examination.

Q. (Mr. BOGLE.) Captain, at the time you went aboard the "Sardhana" with Mr. Walker, was he making a survey of the [324—153] fire damage?

A. I think he had already made his survey. I believe he had been on board before, because he did not make any notes the day I was aboard. I think his survey had been made previously to our going aboard.

Q. At that time you had no particular interest in the matter beyond mere curiosity?

A. That is all.

Q. Did not make a minute examination, as if you

(Testimony of S. B. Gibbs.)

were making a survey?

A. No. I do not suppose I did. I did not look quite as closely.

Q. You do not know, Captain, anything about the condition of the weather on the night this barge capsized?

A. No, I do not recollect anything about it.

Q. Captain, in extreme heavy weather outside of the harbor would not there be considerable ground swell get in and reach the vessels inside of the harbor?

A. I never seen much ground swell outside of the harbor, not enough to come in there. I do not know that I have ever seen any ground swell in Eagle Harbor. I cannot recollect that I ever saw any in there.

Q. If there was such a ground swell, Captain, even though the barge was moored on the inshore side of the "Sardhana," it might affect her, if the barge and "Sardhana" were moored together—in other words, it would reach the barge?

A. A heavy ground swell might possibly affect the barge, if there had been any.

Q. You did not examine the barge to see if she had been leaking. Do you know whether or not any repairs were **[325—154]** made to the barge?

A. No, I do not.

Q. You heard Captain Walker's testimony this morning of the survey he made of this barge, and the fact that she was making no water?

A. Yes, sir.

(Testimony of S. B. Gibbs.)

Q. In this particular suit, Captain, you represent the respondent in this case, don't you, that is, they are members of the board that you represent?

A. Yes, sir.

Redirect Examination.

Q. (Mr. McCLANAHAN.) Would it have been possible for Mr. Walker to have ascertained whether that barge was leaking or not by the inspection and survey which you heard him testify to this morning?

A. It would be rather difficult to find out if the vessel was leaking, the way he stated the survey was made. It would be rather hard work.

Q. What would be the proper method of ascertaining whether that barge leaked or not?

A. Well, our method, if there is a leak and if we cannot locate the leak after looking at the vessel all over, is to put water into the vessel, pump water in and see where the water comes out.

Q. Fill her up.

A. Yes, fill her up as much as is necessary. We frequently do that where we are unable to determine where the leak was.

Q. If the leak is not obvious from inspection, do you know any other method by which it can be determined? [326—155] A. No, I do not.

Q. Are all leaks patent to the eye, in barges?

A. No.

Q. (Mr. BOGLE.) Captain, do you know that Mr. Walker did not use that method to ascertain that fact?

A. No, I do not know, only just what he stated.

(Testimony of S. B. Gibbs.)

Q. You do not know whether or not the barge had water in her when she was taken out on the gridiron?

A. No, I do not.

(Testimony of witness closed.)

It is admitted that the statements of fact contained in the extended protest are taken from the log of the "Sardhana."

Testimony closed. **[327—156]**

United States of America,
Western District of Washington,
County of King,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle in said District, do hereby certify, that

The foregoing transcript from page 1 to page 156, both inclusive, contains all of the testimony offered before me by the parties to said cause.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

The testimony was reduced to writing by me on the dates shown in said transcript. The exhibits referred to in the transcript and shown in the index are returned herewith.

Proctors for the parties stipulated waiving the reading and signing of the testimony given by the witnesses.

It was also stipulated that the testimony be taken before me as United States Commissioner and returned by me into Court, the same as if an order of

reference had been regularly entered in said cause.

The taxable costs incurred before me are shown in the statement following this certificate.

I further certify that I am not of counsel nor in anyway interested in the result of this suit.

Witness my hand and official seal this 26th day of February, 1913.

A. C. BOWMAN,
United States Commissioner. [328]

[Title of Court and Cause.]

Final Decree.

This cause having been duly referred to a Commissioner, and testimony having been taken by the Commissioner and returned to this Court, and the said cause having come on regularly to be heard upon the pleadings and proofs, and counsel for the respective parties having been heard, and the Court having, after due deliberation had in the premises, filed its memorandum decision herein on January ——, 1914, in which the Court found and now finds that the respondent, Thames & Mersey Marine Insurance Company, Ltd., is liable to libelant for the total amount of damage claimed in the libel herein;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-named libelant, Pacific Creosoting Company, do have and recover from the above-named respondent, Thames & Mersey Marine Insurance Company, Ltd., the sum of Eleven Hundred Ninety-seven and 20/100 Dollars ($1197.20), together with interest on

said sum from the 10th day of August, 1910, at the rate of six per cent (6%) per annum, amounting in all to the sum of Fourteen Hundred and Fifty-one and 56/100 Dollars ($1451.56), together with its costs herein to be taxed.

Dated at Seattle, Washington, this 26th day of February, 1914.

JEREMIAH NETERER,
Judge. **[330]**

[Indorsed]: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 26, 1914. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy. **[331]**

[Opinion on Exceptions to Libel.]

[Title of Court and Cause.]

IN ADMIRALTY. Libel *in personam*, to recover for partial loss on a policy of marine insurance. Exceptions to libel overruled.

BOGLE, MERRITT and BOGLE, for Libelant.

BRADY & RUMMENS, for Claimant.

HANFORD, District Judge:

This suit is founded on a marine policy insuring a cargo of iron drums containing creosote oil shipped from London, England, to Eagle Harbor in Puget Sound by the British ship "Sardhana." In storms encountered during the voyage, the cargo was battered and damaged and after the arrival at her port of discharge, a gale of wind caused a barge used for lightering the cargo from the ship to land, having a load of 272 drums, to be capsized and by that casu-

alty, four drums were lost and a large salvage expense was incurred. The losses from the causes indicated amount in the aggregate to more than 20% of the total value of the cargo and by a marine survey and report of average adjusters, the respondent's liability was fixed at $1197.20, which is the amount of insurance on that part of the cargo lost, added to expenses incurred under the sue and labor clause of the policy. **[332]**

The respondent claims exemption from liability on a condition of the contract known in the insurance business as the "F. P. A. Clause," which reads as follows: "WARRANTED free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire, * * * ." In marine insurance law the phrase "Warranted free from particular average" means that the insurer does not assume liability for a partial loss, and the controverted question in this case is whether the conditional liability in this case became absolute by reason of a fire in the ship after her arrival at her port of discharge. In the libel it is averred that:

> " * * * On November 18th, while lying in said Port of Eagle Harbor, and before discharging said cargo, a fire broke out in the after 'tween-decks of said ship, and burned the bulkhead forward of the lazarette, the door thereof and a considerable portion of dunnage and other parts of said ship * * * ."

And in an exhibit attached to the libel there is quoted from the ship's protest, a statement concerning the fire as follows:

"November 18th: Stevedores continued to discharge the cargo and at 5:00 P. M. finished for the day. 291 further drums were discharged. About 9:30 P. M. smoke was discovered issuing from the after hatch, by one of the crew who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter,' the SS. 'Hornelen,' and the employees of the Pacific Creosoting Company who brought with them several chemical fire-extinguishers. The Master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after-'tween decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel) and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

In their argument in support of exceptions to the libel, proctors for the respondent urge that the libelant's claim is based upon a bare technicality. If so, the claim is nevertheless the assertion of a substantial and legal right, by the contract insurance was paid for and written, the "F. P. A. Clause" makes an exception to the liability of the insurer and [333] is to be construed strictly. 19 Am. &

Eng. Enc. of Law (2d ed.), 1065; Canton Insurance Office v. Woodside, 90 Fed. 301. The proctors on both sides of the case have informed the Court that after diligent search they have been unable to find any adjudicated case, English or American, giving an interpretation of the "F. P. A. Clause" since the words "on fire" came into use as a substitute for the word "burnt" in the forms of policy used previous to the decision in the Glenlivet case, VII Aspinwall Mar. Cases, N. S., 342, 395; 19 Am. & Eng. Enc. of Law (2d ed.), 1070. The words "on fire" are not synonymous with the word "burnt," and the change of phraseology, manifestly, was not made without a purpose. Having no precedent to follow this case must be decided according to reason and good sense. The words "on fire" in connection with a ship, do not comprehend, necessarily, every fire that may be on board of the ship, nor do they have the same meaning as "consumed by fire" or "destroyed by burning." They are indicative of a happening whereby the ship is endangered by actual fire burning some part of it and necessitating extraordinary efforts to prevent serious damage. A bulkhead between decks is part of a ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm and if not properly subdued would certainly be destructive and such a happening would be truthfully described by saying that the ship was "on fire."

It is the opinion of the Court that the libel tenders an issue as to whether the ship was in fact on fire within the meaning of the clause of the policy relied

upon to exempt the respondent from liability, therefore the exceptions must be overruled.

C. H. HANFORD,
United States District Judge. [334]

[Indorsed]: Opinion. Filed in the U. S. District Court. Western Dist. of Washington. Jan. 16, 1911. R. M. Hopkins, Clerk. [335]

[Title of Court and Cause.]

Memorandum Decision on Exceptions to the Answer and on Exceptions to Interrogatories Propounded by the Respondent.

It is the opinion of the Court that paragraphs 7 and 9, containing the first and third alleged affirmative defenses, if considered as allegations of facts and not bare legal conclusions, are insufficient to raise any distinct issue, but merely reiterate in an affirmative form, matter contained in a preceding part of the answer in the form of denials of the averments of the libel. As to said matters, the denials complete the joinder of issues and are sufficient to support evidence rebutting evidence which the libelant will be required to introduce in support of the cause of action alleged.

The policy of insurance sued upon is an English policy, and the respondent has a right to plead the English law applicable thereto, and thereby assume the burden of proving as a fact by competent evidence, that according to English law the contract must be interpreted in a way to preclude the right claimed by the libelant to delete the F. P. A. clause

of the policy, by reason of such facts and circumstances as may be proved by the evidence to be introduced.

It will be ordered that the exceptions to paragraphs 7 and 9 of the answer be sustained; and that the exceptions to [336] paragraph 8 of the answer be overruled.

It is the opinion of the Court that interrogatories 3, 4 and 9 attached to the answer are either superfluous or immaterial, and the exceptions to the same are sustained.

The respondent is not entitled to require the exhibition of documentary evidence, therefore the exception to interrogatory 5 is sustained in so far as it calls for the production of a copy of the report of any survey which may have been made, otherwise said exception is overruled.

The Court overrules the exceptions to interrogatories 1, 2, 6, 7 and 8.

C. H. HANFORD,
Judge.

[Indorsed]: Memorandum Decision on Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. April 20, 1911. R. M. Hopkins, Clerk. [337]

[Opinion on Final Hearing.]

[Title of Court and Cause.]

Libel *in Personam* to Recover for Partial Loss on a Policy of Marine Insurance. Opinion on Final Hearing.

BOGLE, MERRITT and BOGLE, for Libellant.

BRADY & RUMMENS, for Claimant.

NETERER, District Judge.

This action is founded on a marine policy insuring a cargo, 2,753 drums of creosote oil in the British ship "Sardhana," shipped from London, England, to Eagle Harbor in Puget Sound, Washington, "including the risk of craft, and/or raft to and from the vessel." There is also incorporated in the policy by attaching to the margin a printed slip, which is not a part of the printed form, the following: "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire. . . . " General average and salvage charges payable according to Foreign statement or York-Antwerp Rules, or 1890 Rules, if in accordance with the contract of affreightment. Including all risks of craft and boats. . . . " "Including all risks of transhipment and of craft, lighterage and/or any other conveyances . . . from the vessel until safely delivered in the warehouse. . . . " In the body of the printed form of the policy: "It is declared and agreed that Corn Fish Salt and Fruit Flour and Seed are warranted free from average

unless general or the ship be stranded, sunk or burnt."

It is alleged that by reason of storms encountered on the voyage the cargo was battered and damage resulted by loss of creosote oil, and after arriving at the port of discharge a gale caused [338] the barge used for lightering the cargo to capsize, and thereby four drums were lost and a large salvage expense incurred. On November 18, a fire broke out in the after 'tween-decks of the ship while lying in the port of Oak Harbor, behind the bulkhead forward of lazarette. The following was entered in the log of the ship, and is sustained by the evidence:

> "November 18th. Stevedores continued to discharge the cargo and at 5 P. M. finished for the day. 291 further drums were discharged. About 9:30 P. M. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter,' the S. S. 'Hornelen,' and the employees of the Pacific Creosoting Company, who brought with them several chemical fire-extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage

in the after 'tween-decks, were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

The respondent claims exemption from liability on account of the Free from Particular Average warranty; that the "Sardhana" was not "on fire"; that no recovery from the four drums lost on the lighter or for the salvage expenses can be had, because the lighter in question was unseaworthy; that no recovery can be had in any event, it not being shown that any creosote was lost; and that, if lost, it was not on the ship at the time of the fire, and the F. P. A. clause does not apply; and that it is not shown what loss occurred because of perils insured against.

It is strenuously urged that the fire was not sufficient to delete the "F. P. A." warranty, and reliance is placed on the Glenlivet, Prob. p. 48, decided in 1893, and cited by the Supreme Court of the United States in London Insurance v. Camponhia, etc., 167 U. S. 149, 156. In the form of policy previous to the Glenlivet case the word "burned" was used in the "F. P. A." clause. After this case was decided the words "on fire" were substituted for the word "burned." No case has been suggested where the [339] words "on fire" has ever been before the courts in the same relation in any other case. The change of the words must have been made for a purpose. These words, as stated by Judge Hanford in passing upon the exceptions to the libel in this case in 184 Fed. 949, are not synonymous. The policy sued on in the body thereof with relation to "Corn,"

etc., uses the terms "sunk" or "burned," and in the margin, with relation to the cargo, especially provides sunk or "on fire," clearly evidencing a purpose in the minds of the parties to distinguish from the former term and construction. The testimony of Mr. Beckett, an Average Adjuster of London, England, shows that "under clauses . . . containing the words 'on fire,' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire." It is clear that "on fire" used in the policy was not to be considered as was "burned" in the Glenlivet case. The warranty is drawn in the nature of an exception to the liability of the insurer, and is strictly construed against him. Judge Morrow, Circuit Judge, in Canton Ins. Offices v. Woodside, 90 Fed. 301, 305, said:

> "In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract of indemnity, and is to be liberally construed in favor of the insured. Yeaton v. Fry, 5 Cranch 335; National Bank v. Insurance Co., 95 U. S. 673, 679; Steel v. Insurance Co., 2 C. C. A. 463; 51 F. 715, 723; and cases there cited; 1 Arn. Ins. (6th ed.) Sec. 295. If the policy will fairly admit of two constructions, that one should be adopted which will indemnify the insured."
>
> "The company cannot justly complain of such a rule. Its attorneys, officers, or agents pre-

pared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

National Bank v. Insurance Co., 95 U. S. 673.

"If the company by the use of the expression found in the policy leaves it a matter of doubt as to the construction to be given to the language, the Court should lean against the construction [340] which would limit the liability of the company."

London Assurance v. Camponhia, etc., 167 U. S. 149.

The fire as shown by the evidence was on some structural part of the ship, and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause.

The contention that the lighter in question was unseaworthy cannot be sustained. The provisions of the policy include "the risk of craft and/or raft to and from the vessel."

"The warrant of seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo."

Arnold on Marine Insurance (8th ed.), sec. 689;

19 Am. & Eng. Encyc. of Law (2d ed.), 1002; 25 Cyc. 645;

Lane v. Nickerson, L. R. 1 C. P. 412.

The burden to show unseaworthiness, if that were material, is upon the respondents.

Nome Beach, etc. v. Munich Assurance Co., 123 Fed. 820.

There is no testimony before the Court to establish such condition.

The bill of lading or shipping receipt for the cargo recites "shipped in good order and well-conditioned by Blagden, Waugh & Company, in and upon the good ship called the 'Sardhana' . . . 2753 drums of creosote oil." The captain of the ship was asked, "Was not all of the cargo in apparent good order and condition when received on said ship?" "Yes, I rejected what we considered bad drums." The ship's log recites, and these facts are in evidence:

> "Sept. 26. It was noticed that by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote."
>
> "Nov. 3. Similar conditions were encountered, and the cargo again worked badly."

The witness Wylie testified:

> "The creosote escaped into the hold of the vessel partly on account of the severe weather and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out."

On the arrival of the ship at its port of discharge, it was found that there had been lost during the voyage the difference [341] between the cargo received and that delivered, which is claimed in the libel.

"There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage."

2 Arnold on Marine Insurance (8th ed.), sec. 689.

The ship "Sardhana" being seaworthy when she left London, the cargo in good order and condition when received on the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libellant is entitled to recover his damage.

The Peter der Grosse, 1 P. D. 414;

Nome Beach, etc. v. Munich Insurance Co., 123 Fed. 827.

Under the terms of the policy, and the warranty being open by reason of the ship being "on fire," the respondents are liable for the total damage claimed.

26 Cyc. 682;

London Assurance Co. v. Camponhia, 167 U. S. 149;

1 Cyc. 884A;

Thames & Mersey Marine Insurance Co. v. Pitts, 7 Aspinwall's Maritime Cases (U. S.) 302.

A decree may be entered accordingly.

JEREMIAH NETERER,
Judge.

[Indorsed]: Opinion on Final Hearing. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 19, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [342]

[Title of Court and Cause.]

Notice of Appeal.

To Pacific Creosoting Company, Libelant Herein, and to Messrs. Bogle, Graves, Merritt & Bogle, Proctors for said Libelant:

Please take notice that the Thames & Mersey Marine Insurance Company, Ltd., respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the United States District Court for the Western District of Washington, Northern Division, dated, filed and entered in the above-entitled cause on the 26th day of February, 1914, and from the whole of said decree.

Dated February 27, 1914.

EDWARD BRADY and
GEO. H. RUMMENS,
McCLANAHAN & DERBY,
Proctors for Respondent.

Due and full service of within Notice of Appeal acknowledged this 27th day of February, 1914, simultaneous with filing thereof.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [344]

[Title of Court and Cause.]

Stipulation Extending Time to July 15, 1914, to File Apostles.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause that the Thames & Mersey Marine Insurance Company, appellant herein, may have to and including the 15th day of July, 1914, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostles on appeal in the above-entitled cause certified by the clerk of the above-named court.

Dated at Seattle, Washington, this 7th day of May, 1914.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.
McCLANAHAN & DERBY,
BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Stipulation Extending Time to July 15, 1914, to File Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May, 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [348]

[Title of Court and Cause.]

Assignment of Errors.

Now comes the Thames & Mersey Marine Insurance Company, Limited, respondent in the above-entitled cause and appellant herein, and says that in

the record, opinions, decisions, decree and proceedings in the above cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors on which it relies, to wit:

1. That the Court erred in overruling appellant's exceptions to the libel herein.

2. That the Court erred in holding and deciding on said exceptions that under the facts stated in said libel the fire on the "Sardhana" was sufficient to delete the F. P. A. warranty in the policy of marine insurance sued on herein.

3. That the Court erred in holding and deciding on said exceptions that the words "on fire" were not synonymous with the word "burnt" under the facts as stated in the said libel.

4. That the Court erred in holding and deciding on the evidence herein that the fire on the "Sardhana" was sufficient to delete the F. P. A. warranty aforesaid. [349]

5. That the Court erred in holding and deciding on the evidence herein that the words "on fire" were not synonymous with the word "burnt" under the circumstances of this case.

6. That the Court erred in holding and deciding on the evidence that as said fire was on some structural part of the ship, and endangered the ship by actually burning some part of it, the said F. P. A. warranty was opened, and it also erred in holding that the "Sardhana" was in fact endangered or that any part of her was burnt.

7. That the Court erred in not applying the de-

cisions in the English case of The Glenlivet, 7 Aspinwall Mar. Cases, N. S., 345, 395, to this case, and in not holding that under the rulings in said case of The Glenlivet the "Sardhana" was not "on fire" within the meaning of the policy sued on.

8. That the Court erred in holding and deciding that under the provisions of the policy in suit the lighter employed to land cargo, which capsized, was not warranted seaworthy, and also in holding that the said lighter was not shown by the evidence to have been unseaworthy.

9. That the Court erred in allowing any recovery either for the goods actually lost from said lighter or for the expenses incurred in salving part of the goods which capsized therefrom.

10. That the Court erred in holding and deciding that under the evidence all of the cargo was in good order and condition when received on board the "Sardhana," and in not holding and deciding that many of the drums of creosote so shipped were in a defective condition causing the creosote therein to leak therefrom. [350]

11. That the Court erred in not holding and deciding that it was not shown by the evidence that any creosote was lost, and in holding and deciding that as much creosote was lost as was claimed by the libelant.

12. That the Court erred in not holding and deciding that the creosote lost (if any), or at least a very large part thereof, was not on board the "Sardhana" at the time of the fire, and that hence the F.

P. A. warranty of the policy was not opened as to such creosote.

13. That the Court erred in not holding and deciding that it was not shown by the evidence how much, if any, creosote was lost because of perils insured against.

14. That the Court erred in not holding and deciding that, as regards the damaged drums, it was not shown by the evidence that any of such drums damaged by perils insured against were on board the "Sardhana" at the time of the fire, and also in not holding and deciding that libelant had not shown the *quantum* of loss, if any, caused by perils insured against.

15. That the Court erred in attempting to apply to this case rules solely applicable to carriers by water and in assimilating the liability of appellant to that of the "Sardhana" and her owners.

16. That the Court erred in awarding to the libelant herein the sum of $1197.20 with interest and costs, in that said award was not warranted by the evidence herein and was and is excessive and erroneous.

17. That the Court erred in holding and deciding that as the F. P. A. warranty was opened by reason of the "Sardhana" being "on fire," the appellant was liable for the full damages claimed. [351]

18. That the Court erred in making and entering its final decree in favor of libelant for said full damages claimed, with interest and costs, and in not making and entering its final decree in favor of appellant with costs.

In order that the foregoing assignment of errors may be and appear of record, said appellant files and presents the same, and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made and entered in the above cause and appealed from.

Dated March 7, 1914.

EDWARD BRADY and
GEO. H. RUMMENS, and
McCLANAHAN & DERBY,
Proctors for Appellant.

Due and full service of copy of *with* Assignments of Error acknowledged this 7th day of March, 1914.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Libelant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 7, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [352]

[Title of Court and Cause.]

Stipulation [Re Depositions, etc.].

It is hereby stipulated and agreed between the parties hereto that in all depositions where the testimony as returned by the certifying officer discloses the question and answer and the same interrogatories are separately attached to the deposition and stipulations, that the duplicate interrogatories, whether direct or cross, may be omitted from the

transcript, and also all stipulations to take depositions may be omitted and all testimony certified shall be considered by the Court of Appeals subject only to the objections noted at the time of taking depositions or hearing of the cause.

It is further stipulated that the ship's door which was introduced in evidence is too cumbersome to be transmitted with the remaining portion of this record, and to that end it is agreed that respondent and appellant Thames & Mersey Marine Ins. Co. will produce the same in the Circuit Court of Appeals at the time of the hearing of this cause.

It is further stipulated that the time for perfecting the record herein for use in the Circuit Court of Appeals, be and the same is hereby extended until the 15th day of August, 1914.

Dated at Seattle, Washington, this 25th day of June, 1914.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

BRADY & RUMMENS,
Proctors for Respondent. [353]

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. June 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [354]

[Title of Court and Cause.]

Order Extending Time for Procuring Apostles to be Filed on Appeal.

In pursuance to stipulation of the parties hereto and good cause appearing therefor:

It is ordered that the Thames and Mersey Marine Insurance Company, appellant in the above cause may have to and including the 15th day of August, 1914, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above-entitled cause certified by the Clerk of the above-named court.

Done in open court this 25th day of June, 1914.

JEREMIAH NETERER,
Judge.

O.K.—BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

O.K.—BRADY & RUMMENS,
Proctors for Respondent.

[Indorsed]: Order Extending Time for Procuring Apostles to be Filed on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, June 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [355]

[Title of Court and Cause.]

Praecipe for Apostles.

To the Clerk of the United States District Court:

Please prepare typewritten apostles to the Circuit Court of Appeals, agreeable to Rules of Ninth Circuit (October 1900, No. 4), in which have it appear:

1. A caption exhibiting the proper style of the court and the title of the cause.
2. Statement showing the time of the commencement of suit (August 12, 1910).
3. The names of the parties.
4. The several dates when the respective pleadings were filed.
5. Statement that the defendant has not been arrested, or bail taken nor property attached.
6. The time the trial was had, and date of Final Decree, to wit: February 26, 1914.
7. The name of the Judges hearing the same.
8. All the pleadings.
9. All the testimony and other proofs, viz.:
   Libel filed August 10, 1910.
   Answer of respondent, filed January 31, 1911.
   Answer of Pacific Creosoting Company to Interrogatories filed May 16, 1911.
   Amended Answer of Libellant to 5th Interrogatory, filed May 26, 1911. [356]
10. Exceptions to Libel, October 22, 1910.
    Exceptions to Interrogatories of Libellant, filed 2/16/11.

Exceptions to Answer, filed February 16, 1911.

Order on Exceptions to Answers and to Interrogatories, filed April 29, 1911.

11. All Exhibits, viz.: Libellant's Exhibits "A," "B," "C," "D," "E1," "E2," "E3," "F," "G," "H," "I," "J," "K," "L," "M."

Respondent's Exhibits, viz.: 1, 2, 3.

12. All depositions, stipulations and interrogatories concerning witnesses and evidence, viz.:

Depositions and Stipulations M. I. Holman.

Depositions and Stipulations Fred M. Beal.

Depositions and Stipulations F. D. Beal.

Depositions and Stipulations and Interrogatories, Alexander Wallace.

Depositions and Stipulations and Interrogatories, E. D. Rood.

Depositions and Stipulations and Interrogatories, Geo. H. Wylie.

13. Testimony reported by A. C. Bowman, U. S. Commissioner.

14. Final Decree, filed February 26, 1914.

15. All opinions of Court, viz.: Opinion or Memoranda, filed January 16, 1911, and April 20, 1911, and January 19, 1914.

16. Order fixing amount of stay bond, filed February 26, 1914.

17. Notice of Appeal and admission of service, filed Feb. 27, 1914.

18. Bond on Appeal and Supersedeas, filed February 27, 1914.

19. Order extending time to July 15, 1914. Filed May 8, 1914.
20. Assignment of Errors.
21. Stipulation and Order of June 25, 1914.

Dated this 25th day of June, 1914.

BRADY & RUMMENS,
Proctors for Respondent. [357]

[Indorsed]: Praecipe for Apostles. Filed in the U. S. District Court, Western Dist. of Washington, June 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [358]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Apostles, etc.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 358 typewritten pages, numbered from 1 to 358, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the

District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [359]

Clerk's fee (Sec. 828 R. S. U. S. as amended by Sec. 6, Act of March 2, 1905) for making record, certificate or return—806 folios at 30c per folio	$241.80
Certificate of Clerk to transcript of record—3 folios at 30c	.90
Seal to said Certificate	.40
Certificate of Clerk to original Exhibits—3 folios at 30c	.90
Seal to said Certificate	.40
	$244.40

I hereby certify that the above cost for preparing and certifying record amounting to $244.40 has been paid to me by Proctors for Appellant, Messrs. Brady & Rummens and Messrs. McClanahan & Derby.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 6th day of August, 1914.

[Seal] FRANK L. CROSBY,
Clerk.

By Ed M. Lakin,
Deputy. [360]

[Endorsed]: No. 2459. United States Circuit Court of Appeals for the Ninth Circuit. Thames & Mersey Marine Insurance Company, Limited, a Corporation, Appellant, vs. Pacific Creosoting Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received and filed August 10, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2459.

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,

Appellant,

vs.

PACIFIC CREOSOTING COMPANY,

Appellee.

Notice of Filing Apostles on Appeal and Designation of Parts of Record to be Printed.

To the Pacific Creosoting Company, Appellee Herein, and Messrs. Bogle, Graves, Merritt & Bogle, Its Proctors:

Please take notice that the apostles on appeal in

the above cause were filed in the above-entitled court on the 10th day of August, 1914.

You are further notified that appellant intends to rely upon all of the assignments of error in said record and considers all of said record necessary for the consideration of its said assignments of error, with the exception of the following pages of the record and the following exhibits which appellant does not consider necessary to be printed in said record and desires to have omitted from said record as printed:

P. 49—Certificate to deposition of M. I. Helman.

P. 59—Certificate to deposition of Fred N. Beal.

P. 95—Certificate to deposition of F. D. Beal.

P. 124—Certificate to deposition of Alexander Wallace.

P. 137—Certificate to deposition of E. D. Rood.

Middle of p. 153 and p. 154—Certificate to deposition of G. H. Wylie.

P. 159 to 170, inclusive—Direct and cross-interrogatories to G. H. Wylie in that said direct and cross-interrogatories also appear in the deposition of said witness.

P. 171—Index to transcript of testimony in lower court.

P. 329—Statement of commissioner's costs.

P. 343—Order fixing amount of bond on appeal.

P. 345 to 347, inclusive—Bond on appeal.

All original exhibits sent up by the lower court for perusal by the Circuit Court of Appeals, which exhibits under Rule 14, Subdivision 4, of the Circuit Court of Appeals are not required to be printed, and

which may be considerd as original exhibits even though not printed.

Omit also the extended title of court and cause except on the first page and in the original libel, and insert in place thereof the words "Title of Court and Cause."

Dated August 11th, 1914.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellant.

Receipt of a copy of the within Notice, etc., is hereby admitted this 18th day of August, 1914.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Appellee.

[Endorsed]: No. 2459. United States Circuit Court of Appeals, Ninth Circuit. Thames & Mersey Marine Ins. Co., Ltd., Appellant, vs. Pacific Creosoting Co., Appellee. Notice of Filing Apostles on Appeal and Designation of Parts of Record to be Printed. Filed Aug. 24, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2459.

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
Appellant,

vs.

PACIFIC CREOSOTING COMPANY,
Appellee.

Stipulation Waiving Printing of Original Exhibits.

WHEREAS, there are considerable number of exhibits in the above cause sent up to the above-entitled court as original exhibits, and it is deemed unnecessary by the parties hereto that the same should be printed in that those referred to, if any, can be fully described in the briefs therein; now, therefore,

IT IS HEREBY STIPULATED AND AGREED that none of said exhibits so sent up to the above-entitled court as original exhibits need be printed, but that the same may be considered by the Court as original exhibits even though not printed.

Dated August 18th, 1914.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellant.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Appellee.

Order Waiving Printing of Original Exhibits.

Pursuant to the foregoing stipulation IT IS HEREBY ORDERED that none of the original exhibits sent up as such in the above cause need be printed, but the same may be considered as original exhibits even though not printed.

Dated August 24, 1914.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 2459. United States Circuit Court of Appeals, Ninth Circuit. Thames & Mersey Marine Ins. Co., Ltd., Appellant, vs. Pacific Creosoting Co., Appellee. Stipulation Waiving Printing of Original Exhibits and Order Thereon. Filed Aug. 24, 1914. F. D. Monckton, Clerk.

No. 2459

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD. (a corporation),

Appellant,

vs.

PACIFIC CREOSOTING COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellant.

Filed this.....day of October, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2459

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD. (a corporation),

Appellant,

vs.

PACIFIC CREOSOTING COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the District Court for the Western District of Washington awarding to appellee $1197.20, with interest (Record, 318), as the full amount claimed (Id. 6) as a partial loss under a marine insurance policy indemnifying against *total loss only,* except the ship be *"stranded, sunk or on fire * * *"* (Id. 9). The policy covers a cargo of iron drums containing creosote shipped on the British ship "Sardhana" from London to Eagle Harbor, Puget Sound, Washington.

The *"memorandum"* clause in the printed body of the policy contains the usual expression *"stranded, sunk or burnt"* (Id. 11), but a printed slip, attached to the margin of the policy, contains *(inter alia):* "War-

*ranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire * * *''* (Original, Libelant's Exh. "A". See also Record, 8 and 9).

The contract dated June 2d, 1908, is that of an English insurance company executed in England, and covers goods which had then been shipped in an English bottom. The vessel sailed from London May 30th, 1908 (Record, 13), and arrived and anchored off the assured's dock at Eagle Harbor November 9th, 1908 (Id. 17), where it was then discovered that some of the creosote containers, or drums, had been dented or damaged by reason of storms encountered on the voyage. After a partial discharge and delivery to the assured, and on November 18th (Id. 17), without damage to the undischarged cargo, a night fire of mysterious origin broke out on the ship in the vicinity of the bulkhead separating the after 'tween decks from the lazarette; and though the vessel had at the time completed her voyage, without any liability attaching to the insurer, nevertheless it is claimed that now, a fire having appeared some nine days after the ship's safe arrival, and after the assured had taken into its warehouse part, and was engaged in discharging and receiving the balance, of the cargo; the particular average warranty of the policy is deleted, and an obligation is thereby created to pay for a prior partial loss caused by sea perils, for which there was insurance against total loss only. If, as we shall show, the *"fire"* was a trivial one,—it is apparent that the claim

is purely technical, and arises under circumstances tempting, at least, to fraudulent imposition, with chances of discovery by the insurer reduced to a minimum.

Furthermore, a claim is made for the loss of four creosote drums with their contents, and salvage expenses, resulting from the subsequent capsizing at night of a completely loaded, but unattended, barge, left moored by the assured alongside the vessel, and furnished and used by it (Id. 69) in lightering the cargo from the vessel to the dock.

Furthermore, although the "Sardhana" was tight, staunch and strong, and in every respect seaworthy for the voyage, *and did not leak,* the appellee's claim includes damages for *a short delivery* by the ship of 56267.2 gallons of creosote (Id. 5),—this latter claim being based upon the difference between the number of gallons of creosote the damaged and leaking drums were assumed to contain at the time of shipment, and the number of gallons claimed to be shown by the assured's ex parte measurement of the drums' contents, *long after delivery.* Instead of attempting to enforce this latter claim against the ship itself, and at the time of discharge, when the facts would have been fresh in mind, the assured remains silent and inactive, allows the vessel to depart *without notice* of any such claim (Id. 119; 124), and then, nearly two years after, proceeds to enforce it against a foreign insurance company which had no control over the "Sardhana", or her world-wide scattered officers and

crew, *the only possible witnesses* having knowledge of the facts necessary to refute a short delivery claim.

The foregoing uncontrovertible facts are thus stated that the court may, in some measure, view this litigation from the insurer's perspective, and thereby gain an appreciation of its motive in carrying to final determination this controversy, even at a cost so large that it would have been a financial saving to have settled the claim without protest. It is not improper to assume that reputable insurance companies gladly pay their just obligations, and often, as a matter of business policy, pay claims which might be successfully resisted on technical but legal grounds; there are circumstances, however, where continued quiescence ceases to be a virtue, and such the insurer feels to be the nature of the claims made at bar.

Assignment of Errors.

These are to be found at pp. 334 to 336 of the record, and we do not deem it expedient to set them forth here, for the reason that our contentions fully disclose what they are and we seek, therefore, to avoid an unnecessary enumeration.

Appellant's Contentions.

As to Damages Claimed for Damaged Drums and Short Delivery of Creosote:

I.

In legal construction a ship must be *on fire as a whole* to delete the F. P. A. warranty.

II.

Under the facts shown in this case, the "Sardhana" was not *on fire* within the meaning of the F. P. A. warranty of the policy.

As to Damages Claimed for the Four Drums Lost From the Lighter, and Salvage Expenses:

III.

This claim cannot prevail because (a) the lighter in question was furnished by the assured and was unseaworthy, and (b) the assured was negligent in leaving it over night alongside the vessel fully loaded and unattended.

As to Damages Claimed for Short Delivery of Creosote:

IV.

The assured cannot recover, even if the ship was legally *"on fire"*, because it has proven no damages.

(a) It has not shown that any creosote was lost;

(b) If any creosote was lost, it was not on board the ship at the time of the fire, and hence the F. P. A. warranty is inapplicable;

(c) It has not shown how much creosote was lost because of perils insured against, it appearing that many of the containers were defective when shipped.

The burden to show the quantum of loss caused by perils insured against has not been even attempted by the assured.

As to Damages Claimed for Damaged Drums:

V.

The assured has not even attempted to prove the number of these which were on the ship at the time of the fire, nor the number which were defective and leaking before the vessel encountered any of the perils insured against.

I.

Argument.

IN LEGAL CONSTRUCTION A SHIP MUST BE ON FIRE AS A WHOLE TO DELETE THE F. P. A. WARRANTY.

The history of this clause is briefly but accurately stated in Gow's work on Marine Insurance (3 Ed., pp. 183-187). There it will be found that the clause originally read: *"Warranted free from average, unless general, or the ship be stranded."* It is not, however, any mere touching of the ground that is held to be a stranding, but a substantial grounding of the ship lasting for an appreciable period (Id. 174-175). Later the words *"sunk or burnt"* were added to the clause, and these words were construed in *pari materia* with the word *"stranded"*, and together with it. This is the view taken by both Barnes, J., in the trial court, and by the court of appeal, in construing the word *"burnt"* in the case of *The Glenlivet,* 7 Asp. Mar. Cas. (N. S.) 395. In that case (which, by stipulation, this court may take judicial notice of, as stating the law of England under the facts there presented, Record, 246),

there were four separate fires in the ship's coal bunkers, involving also damage to the ship's plating, brick and wood casing and hatches. We quote the following extracts from the opinion of Barnes, J., in the lower court, holding that the ship was not "*burnt*" within the meaning of the exception:

> "The memorandum itself was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear, and the original exception of stranding tends to show that this was the scope of the memorandum. The framers had probably in view a casualty of so serious a nature as to be akin to wreck —that is, such a loss as makes it probable that the damage, though under the given percentage, might reasonably be attributed thereto and not to the perishable nature of the subject matter of the insurance. * * *
>
> "There have been a large number of decisions upon the word 'stranding', and in these various definitions of the word may be found, but, in my opinion, there runs through them all, in a greater or less degree, the idea which was probably present to the minds of the framers of the memorandum of a serious casualty to the ship affecting her safety and navigation, even though, as a matter of fact, the amount of damage sustained is unimportant. * * * From the collocation of the words 'sunk or burnt' with the word 'stranded' and from the primary impression produced by reading these words 'sunk or burnt', it is natural and reasonable to construe them upon the principle applied, and with the idea prevailing in arriving at the proper meaning of the word 'stranded'. * * * There are no decisions upon the word 'burnt' in the memorandum in the policy, and it is a remarkable fact if, as Mr. Aspinall contended, the momentary setting fire to any part

of a vessel—such, for instance, as cabin curtains or fittings—is enough to cause the vessel to be a 'burnt' ship, and thereby destroy the warranty, that the present contention has never been brought before the courts since the introduction of the words 'sunk or burnt', though one would think that slight damage by fire was not infrequent on vessels, especially large passenger vessels. * * * I cannot bring myself to think that it would be a reasonable or businesslike construction of the word 'burnt' to hold that the ship is burnt if any part of her or her stores or fittings is slightly injured by fire, whether that fire is one which exhausts itself without danger to the vessel, or, as was also suggested by the plaintiffs, is one which unless promptly extinguished would cause danger to the vessel. In my opinion the more reasonable and businesslike construction is that the ship is 'burnt' whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is pro tempore incapable of being properly used for the purposes of her voyage. This may be expressed by the term 'temporarily unnavigable'. In the present case, on the first voyage, the coals heated slightly, and water being poured on them, whatever fire existed was extinguished. Even assuming that coals are to be treated as included in the word 'ship', which the plaintiffs alleged and the defendants did not deny, there was no interruption of the voyage, nor any interference in any way with the safety or navigation of the vessel. On the second and fourth voyages the heating of the coals caused some damage to the structure of the vessel, but again, there was no interruption of the voyage, or any interference with the vessel's safety or navigation. I am of opinion that upon none of the voyages was the ship burnt within the meaning of the policy, and that the defendants are entitled to judgment with costs."

7 Asp. 342, 343, 344.

The case went to the Court of Appeal and there the respective judges went even further than Barnes, J., in their holdings as to when a ship is *"burnt"*.

Lindley, L. J., says:

> "Now, the facts so far as they are material, are not in dispute at all. There was a fire on board this ship in one of the coal bunkers, and the fire was so severe that some damage was done to the structure of the ship; it is unnecessary to particularize it, but a plate got cracked and some angle irons got burnt. The ship was an iron ship; how much wood was on board I do not know, but it is sufficient to say that the fire clearly injured the ship. Now comes the question whether this ship was 'burnt' within the meaning of that expression. Barnes, J., has held not, and, in my opinion, that is obviously right. I say 'obviously', because we must look at this word 'burnt' in reference to the context, it is part of a phrase 'unless the ship is stranded, sunk or burnt'. What does that mean? I take it the context shows that what is meant is that the ship as a whole must be stranded, sunk, or burnt, and I cannot accept Mr. Aspinall's construction or suggestion that any fire on board a ship, doing a little structural damage to the ship itself, is a burning in ordinary language. It appears to me it is not so."
>
> (Id., p. 395.)

Smith, L. J., says:

> "Now I come to the suggestion of Mr. Aspinall, that it means the initiation of such a fire that, unless it were put out, it would consume the ship. I cannot think that can be the meaning of this, for there never could be a fire which, if not put out, might not consume a ship. If the cabin curtain caught fire and was not put out, that might end in the destruction of the ship. Therefore,

that will not do. Then I come to the suggestion of my brother Barnes, which is, that it must be a burning such as to render the ship temporarily unnavigable. I do not think that is right, if I may say so, because, supposing there was such a burning as only to stop the ship half an hour—suppose a ship was steered by rudder-cords instead of by chains; suppose the rudder-band was burnt, and stopped the ship for half an hour—would you call that a burnt ship? I should not; but that would come within my brother Barnes's definition if she was temporarily unnavigable whilst the rudder-band was being adjusted. I do not think that is right. My own view is you would have to tell the jury what I have already said about partial burning (that the other was not the correct direction), and then you would have to tell the jury that a partial burning may, under some circumstances constitute a burning ship, and may not under other circumstances, and having given that direction you would have to ask them: Has the fire been such as to bring the ship to such a condition that you consider the ship a burnt ship? Then the jury would decide whether the facts brought it up to what you had laid down as the question for them to decide. I think my brother Barnes put too narrow a construction upon the words 'burnt ship', but otherwise I agree with his judgment."

(Id., p. 396.)

It is clear from these opinions that a mere injury to the ship by fire does not constitute a *"burning"*, but that *"the ship as a whole must be stranded, sunk or burnt"* to bring it within the warranty, and that the words *"sunk or burnt"* must be used in collocation with the word *"stranded"*.

In the case at bar the words used in the policy are *"on fire"* and not *"burnt"*. We submit, however, that the clauses are substantially the same, for in either case the words must be construed in collocation with the words *"stranded"* and *"sunk"*, *"the ship as a whole must be stranded, sunk or (on fire)"*. On this subject we quote frankly from Mr. Gow's work at page 181:

> "The judgment in the Glenlivet has excited considerable attention, as it takes away on principle what was long granted without question. But indeed it is not easy to see why a fire in a ship's bunkers or cabin should be enough to establish a claim for damage to cargo arising from some other peril barred by the memorandum, when a touch-and-go graze on a rock, even if actually causing damage, is not enough. Since the issue of the decision some slips have had the words 'on fire' added to 'burnt', confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision."

In a note to this passage the learned author further says:

> "But will not exactly the same principle that was applied in the interpretation of 'burnt' be applied to that of 'on fire'? For it is not a question of the extent of the effect of ignition; if ignition results in the total loss of the property insured, then the loss is claimable as a total loss and not under the memorandum or any other clause referring to partial loss; if it does not result in a total loss, then, as far as the memorandum is concerned, is it not all the same whether you say 'burnt' or 'on fire' so long as the principle of 'substantial burning of the ship as a whole' is applicable? This is the principle stated by Lord Justice Lindley in the Glenlivet decision, Court of

> Appeal, 1894, 1 Q. B. D. 48: 'I take it the context shows what is meant is that the ship as a whole must be stranded, sunk or burnt; and I cannot accept the suggestion of the plaintiff's counsel that any fire on board a ship doing little structural damage to the ship itself is a burning in ordinary language. * * * Of course, in one sense it is burnt; anything that burns any part of a ship is a burning of the ship, but I cannot think that that is the meaning of it here.' ''

Opposing counsel takes the position that *any* burning of the *ship itself* constitutes the ship a *''burnt''* ship, and in the lower court they referred to Mr. Gow as laying down that rule and to a certain opinion by Mr. Walton and Mr. Barnes given *before* the Glenlivet case was decided. They also contended that such was the understanding of the contracting parties. That may have been true before the decision in the Glenlivet case; it certainly is not true now, and Mr. Gow recognizes this when he says:

> ''As it was decided by Lord Ellenborough that a mere touching of the ground was not sufficient to make a strand, so it is now decided in the Glenlivet case that a mere burning is not sufficient to take the exception out of the memorandum; it must be such a burning as to constitute a substantial burning of the ship as a whole.''
>
> (Id., 181.)

In view, therefore, of the Glenlivet case, it is clearly the English law that it is insufficient to show that *''a part of the fabric of the ship''* was on fire, there must be a substantial burning of the ship *as a whole;* not, of course, that the ship must be on fire in every

part, but simply that the fire must be such as to enable the court to say that the ship *as a whole* was on fire. Such must now be held to be the understanding of parties to policies in which the word *"burnt"* is used, whatever the understanding may have been before the Glenlivet decision.

Let us now refer to the contention that in the substitution of the words *"on fire"* for the word *"burnt"* the law of the Glenlivet case is avoided. Conceding, for the purpose of this argument, that this substitution was made at the instance of the assured in the hope of getting back what had been taken away by the Glenlivet decision, the substituted words do not accomplish the result hoped for, for, if the ship *as a whole* must be *"burnt"*, obviously the ship *as a whole* must be *"on fire"*. We say obviously, for we believe that this court, in construing this English policy, will follow the principle laid down by the English courts, and hold that *"there must be a substantial burning of the ship as a whole"* in order to delete the F. P. A. warranty of the contract sued on.

The Glenlivet case was cited with approval in *London Assurance v. Companhie de Moagens do Barreiro*, 167 U. S. 149; 156, 157, and in the same case in the lower court, where the F. P. A. warranty was construed, the court says, quoting from an opinion by Mr. Justice Gray:

> "A diversity in the law, as administered on the two sides of the Atlantic, concerning the interpre-

tation and effect of commercial contracts of this kind, is greatly to be deprecated."

*(68 Fed., at p. 250.)

Undoubtedly this court will be asked by the appellee to ignore the principle of the Glenlivet case, and apply instead the rule that a doubtful intention appearing in an insurance policy must be resolved in favor of the assured, on the theory that all contracts of indemnity are to be liberally construed to that end. While we recognize this general rule, we submit that it is subject to another specifically applicable to the facts of the case at bar, namely: That words of *exception* in a policy, if doubtful, are to be construed most strongly against the party *for whose benefit they are intended.* This latter rule of construction is recognized but applied *against* the assured by the trial court on a superficial conception of the facts. While it may be admitted, as held by the court, that ordinarily the F. P. A. warranty is an exception to the underwriters' liability, and in its interpretation must be read most strongly against him in cases of doubt as to its meaning, still, in the case at bar, it is obvious that the contention and *necessary* argument of the appellee, if it is to avoid the principle of the Glenlivet case, is that the *original* clause in favor of the underwriter, by way of exception to liability, is changed by the substitution of words intended to

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*Note. By the average statement shown at p. 26 of the printed record, the court will see that the two larger policies covering the "Sardhana's" cargo were underwritten at Lloyds, and it will not be denied that at this time suit has been brought in the English courts on these Lloyd policies. It is to be hoped, therefore, that irrespective of how these cases may be decided by the respective courts, there will be no diversity in the construction of the "on fire" clause of the policies.

increase his liability. In the Glenlivet case, the courts gave to the word "*burnt*" a meaning and scope unfavorable to the contention of the assured, and the assured in the case at bar, charged with knowledge of this construction, attempts to so change the clause as to *enlarge* the liability of the underwriter, and the protection of the assured, over that laid down by the court, by having the words "*on fire*" substituted for the word "*burnt*".

We submit, therefore, that under such circumstances, in construing the substituted words of exception, the rule, in case of doubt as to the meaning, should be applied against the assured, and not in his favor, as was done by the trial court.

> *Canton Ins. Office v. Woodside,* 90 Fed. 301, 306, citing:
>
> *Palmer v. Ins. Co.,* Fed. Cas. No. 10698;
>
> *Donnell v. Ins. Co.,* Fed. Cas. No. 3987;
>
> *Yeaton v. Fry,* 5 Cranch 335.

In the Palmer case, the head note reads:

> "Words of exception in any instrument are to be construed most strongly against the party for whose benefit they are intended, and this rule is applied to words of exception in policies of insurance."

While the substituted words "*on fire*", when inserted in the clause, become the words of the underwriter and binding on him, still, as they are shown in this case to have been substituted at the instance of the assured, and for his benefit, we submit that, if in their use there be ambiguity, the rule of construction, admittedly

against the underwriter when applied to the exceptive clause as a whole, should when applied to the *substituted words,* be against the assured. We can see no logical reason why, even in the construction of a policy of marine insurance, the rule as to exceptions should not be applied *against* the assured, if it be clear that the exceptive words were intended for his benefit.

> Q. Now, will you please tell me, Mr. Beckett, who does that placing on the margin of the policy of the memorandum that you find there? As a rule, does not the broker place it there?
>
> A. The broker or the company.
>
> Q. If that was placed there by the company, their printed forms have *"burnt"* in the body of the policy, don't you think they would still place on the memorandum pasted on the side a clause that was harmonious with the body of the policy?
>
> A. No, sir, because the assured would not accept it.
>
> Q. The assured would not accept it?
>
> A. No, sir.
>
> * * * * *
>
> Q. Well, it is against the interest of the company, is it not, to use the expression "on fire" rather than "burnt", since the decision in the Glenlivet case?
>
> A. Yes, sir.
>
> Q. Can you explain how, then, a company would in the body of their policy use the expression "burnt", and then on that printed pasted slip use the expression "on fire"?
>
> A. The printing in the body of the policy is an old form. If the assured wants better risks that are not covered in the body of the policy, they are given him by attaching the slip.
>
> (Beckett Record, 232, 233.)

Q. * * * You said that the assured was the man that wanted better protection was the reason the expression was changed. * * *

* * * * * *

A. It is common knowledge that it is the assured that wants it, not the company. * * *

(Id., 238, 239.)

In the Glenlivet case, the trial court construed the exception in favor of the insurer despite the fact that it recognized it as *"framed to protect the underwriter"*, and was, therefore, an exception in his favor. If, therefore, it be clear that the substituted words in the policy in suit were hoped by the assured to enlarge the insurer's liability, and his protection,—if there be ambiguity in the substituted words, why does not the rule and the equities call for a strict construction against the *assured?*

We pass now to an examination of the facts relative to the extent of the fire in the case at bar.

II.

UNDER THE FACTS SHOWN IN THIS CASE, THE "SARDHANA" WAS NOT "ON FIRE" WITHIN THE MEANING OF THE F. P. A. WARRANTY OF THE POLICY.

Eliminating from the record all matter of undue excitement and properly disregarding the precautionary measures naturally taken upon the outbreak of a fire on board a vessel laden with a cargo as inflammable as creosote (Record, 80; 305), there is left, as shown by a preponderance of disinterested evidence, the single

fact that the fire consisted solely of a partial burning, or *"charring"*, as some of the witnesses termed it, of a sliding battened door forming part of the bulkhead separating the ship's storeroom from the 'tween deck cargo space (Baird, 268; Preece, 283, 284; Yeaton, 297, 298),—a fire so trivial that, when subsequently viewed dispassionately by the man most interested in knowing and determining the damage wrought, it was considered unworthy even of reporting to his principal.

Q. What was your occupation in November, 1908?

A. I was marine superintendent in Seattle for Andrew Weir & Co.

Q. Who was the owner at that time of the bark Sardhana?

A. Andrew Weir & Co.

(Baird, 262.)

Q. Do you remember, captain, the fact of a fire having broken out on the Sardhana at that time?

A. Yes, sir.

Q. Did you at any time after the fire have occasion to see it?

A. The captain come over here and reported to me there had been a fire on board; I went to Eagle Harbor the next day with him.

Q. What for?

A. To see if any damage had been done to the ship.

Q. What did you find?

A. I found there was no damage that required repairing.

Q. What was it exactly that you found?

A. I found that the fire apparently had taken place at the outside of the *lazaret* door, and the door was scorched, and the underside of the deck above it was smoke stained.

Q. Was the ceiling above burned at all?
A. The underside of the deck?
Q. Yes.
A. No.
Q. Was the floor of the upward deck burned at all?
A. No.
Q. Was the bulkhead, aside from the door, burned?
A. No.
Q. Did you make an examination to ascertain that fact?
A. I did.
Q. Have you seen the door recently?
A. Yes, sir.
Q. State whether or not the door as you saw it did or did not represent the extent of the fire?
A. That represented the extent of it.

(Id., 267, 268.)

Q. What business had you in connection with the investigation of this fire?
A. Well, it was my business to see that the vessel was—if she was damaged, to see that she was repaired, to report to the underwriters of the vessel and have it repaired.
Q. Did you make any such report?
A. No.
Q. Did you make a report of any kind?
A. No.
Q. Why not?
A. Nothing to report of any importance.

(Id., 269.)

This, we properly assume, to be the testimony of an impartial witness, entirely disinterested in the outcome of this case, but who was vitally concerned at the time in the question of the extent of this fire. As illustrative, however, of the eager concern of the

appellee to establish a case of more than a trivial fire, we here add to Capt. Baird's testimony on the subject of repairs some further disinterested evidence, which we will then parallel with appellee's sworn statement on the subject.

Capt. Wallace of the "Sardhana", testifying in New York, says:

> 11th Interrogatory (Record, 98). Were any repairs made to your ship on account of said fire?
> A. (Record, 115). No, absolutely none at all.
> 12th Interrogatory. Were any repairs made necessary thereby?
> A. No.
> 13th Interrogatory. If your answer to the 11th interrogatory is that no repairs were made on account of said fire, state if you know what would have been the approximate cost of such repairs if they had been made?
> A. The only repairs that could have been done to the door was to give it a coat of new paint, and that would have been done in any case; I would say that there was no cost at all. The door would have been painted in any case, whether it had been burnt or not.

(See also answer to 22d Interrogatory, Record 100, 117.)

Capt. Wylie, the first officer of the "Sardhana", testifying in London, says:

> 11th Interrogatory. Were any repairs made to your ship on account of said fire?
> Answer. No.
> 12th Interrogatory. Were any repairs made necessary thereby?
> Answer. No.
> 13th Interrogatory. If your answer to the 11th Interrogatory is that no repairs were made on

account of said fire, state, if you know, what would have been the approximate cost of such repairs if they had been made.

Answer. All the repairs that were rendered necessary were simply a rub with a paint brush; the approximate cost would be 1d or 2d—the cost of a brush full of paint.

(Record, 142.)

C. R. Yeaton, second officer of the British steamer "Oteric" (which, by chance, arrived in Seattle at the time of the hearing of this case), who was an apprentice on the "Sardhana" on the voyage in question, and remained on the bark for about two years thereafter, testifies before a commissioner:

Q. Were there any repairs ever made to the fire damage?

A. None.

Q. Were any repairs ever needed?

A. Well, I should say no, because if there had been any they would have had them done to save the ship's stores.

Q. This door protected the stores from pilferage?

A. Yes, sir.

(Record, 298.)

Q. When you left her (the Sardhana, two years after) there had been no repairs made to the fire damage?

A. None.

(Id., 299.)

We will now parallel the foregoing testimony, with the sworn statement of appellee, referring to this matter of repairs, as the same is found in the interrogatory

annexed to appellant's answer and appellee's reply thereto:

> 6th Interrogatory. Was the damage caused by said fire such as to require any repairs, and, if so, state what they were, who made the repairs and the cost thereof.
>
> (Record, 31.)

> To the sixth interrogatory libelant says: That the damage caused by said fire to the said ship, was such as to require repairs; that such repairs consisted of *removing the burned bulkhead and building a new one in its place. These repairs were made by the ship's carpenter.* Libelant is unable to state the cost of such repairs. (Italics ours.)
>
> (Record, 32.)

The unqualified oath, under which this deliberately considered and written statement is made, is given a more remarkable color in view of an entire absence of even an attempt to substantiate it. Furthermore, on *cross-examination* by the appellant, the officer of the appellee who made this statement, and swore to its truth, says that he got his information from Mr. Frank Walker, appellee's surveyor, and from Mr. F. D. Beal, appellee's superintendent (Stevens, 177). Here, however, is Mr. Walker's testimony on this point, also brought out on *cross-examination:*

> Q. Now going back to these questions again (the interrogatories attached to appellant's answer). We asked them (the appellee) whether the damage caused by the fire was such as needed repairing, such as required repairing, and their reply was that the damage was such as it required repairs, and that the repairs were made and consisted of remov-

ing the burned bulkhead and building a new one in its place. Did you furnish them with that information?

A. No. I had nothing to do with that.

(Record, 204.)

Superintendent Beal, on *cross-examination,* testifies:

Q. We asked them if any repairs were made to the ship and they said, yes, the bulkhead was replaced by a new one; did you furnish that information?

A. No, I don't remember of furnishing that information.

(Record, 89.)

In the face of a record such as this, we reach the unpleasant conclusion that appellee, after deliberate consideration, has permitted a misstatement of a very material matter. The company against which this suit is brought has no control of the "Sardhana"; the suit was not brought when the evidence was easily available to establish the material facts. Appellee borrows the ship's log, copies the entry as to the fire into a protest prepared for the master to sign (Record, 121; 160), hires a surveyor to look at the place of the fire, surveys the capsized lighter, ascertains the claimed amount of creosote short delivered, and then, a year and eight months from the date of the fire, when the "Sardhana" is in distant seas, and her officers and crew scattered, brings this suit. Perhaps the circumstances made it safe to concoct, out of whole cloth, this repair story in the belief of appellant's inability to disprove it. The program failed, however, for although forced to seek

far, appellant not only proves by the ship's officers the falsity of the statement, but concludes the refutation by securing, from out the ship, the *unrepaired* door and bringing it, in the condition it has remained since the fire (Yeaton, 299), thousands of miles to the scene of trial. And not only this, but during the hearing before the commissioner, a ship from foreign shores sails into the jurisdiction of the trial court, bringing one of the "Sardhana's" scattered crew, who appears and testifies in the case (Record, 292). The undoing of appellee on this point is thoroughly accomplished, though at considerable expense, and we believe that the recklessness shown in the attempt to make good this very material matter, casts a doubt on its entire proof, which this court will find it difficult to ignore.

Returning now to our presentation of the evidence of the fire's extent, we call the court's attention to the further testimony of Captains Wallace and Wylie. As has been stated, the former's deposition was taken in New York and the latter's in London. Both of these men remained with the "Sardhana" until May, 1911 (Wallace, 114; Wylie, 140), and both were disinterested observers of the extent of the fire from its inception until this latter date. Capt. Wallace says:

> The nature of the fire—as regards the nature of the fire, I would say it was a very trifling affair; the damage to the ship was practically nothing. The lazarette door was slightly charred and blistered, a very small part of it. As far as I can remember, there were only about two feet or 2½ feet of it from the bottom of the door up that was blackened by the fire and a little bit charred.
>
> * * * * * * *

> The fire was put out in about three minutes; not more than five minutes, anyway, by about half a dozen buckets of water being thrown on it.
>
> (Record, 114, 115.)

Captain Wylie says:

> The extent of the fire was very slight; no part of the ship was damaged to any extent. The parts were, the door of the lazarette bulkhead was affected by the fire, that is, it was scorched and a small portion was slightly more than scorched, perhaps, slightly charred by the flames. There was no damage to the bulkhead bar, a very slight blistering of a small portion of the paint.
>
> * * * * * * *
>
> The means used (to extinguish the fire) were half a dozen buckets of water; the time was less than five minutes.
>
> (Record, 141.)

We cannot too strongly emphasize the value of this testimony, coming as it does from disinterested parties who actually saw the fire, and participated in its extinguishment, and who, because of their relation to the owner, would have been derelict in duty to have passed unnoticed a material damage to the ship. There is much in the pleadings and in the record about the dense smoke, the bucket line, the ringing of bells and other excitement; but we have here the word of men whose duty and interest called for the truth, and who were on the spot, saw the fire and did the work necessary for its extinguishment. No doubt there was excitement, no doubt unnecessary water was passed down into the lazarette after the fire was out, no doubt fire extinguishers were used, but both Wallace and Wylie say

that, *in the work of actually extinguishing the fire, there was no outside assistance rendered* (Wallace, direct inter. 9, Record, 98, Answer, 115; Wylie, Record, 142).

The fire was evidently started among gunning sacking lying on the 'tween decks floor, and the smudge of the burning cloth had much to do with the quantity of smoke which passed up into and through the cabin. For some time after the flame was extinguished, in the nature of things, smoke was still coming up through the cabin from the extinguished blaze. It is, of course, common knowledge that wood will smoke after fire in it has been extinguished with water, and this probably accounts for statements made by some of the witnesses as to the length of time the fire burned; on deck, seeing the smoke, they assumed there was still fire below.

Another disinterested witness, who had full and repeated opportunity to know the extent of the fire, is Yeaton, the "Sardhana's" apprentice:

> Q. Was the ceiling or the under part of the deck burned at all?
>
> A. No.
>
> Q. Was the floor of the between decks burned at all?
>
> A. No.
>
> Q. Was the bulwark burned at all other than the door?
>
> A. The bulkhead?
>
> Q. The bulkhead, I mean.
>
> A. No, not that I saw.
>
> Q. How many times did you see that after the fire itself?
>
> A. I should say daily for quite a long time. My work took me down there practically every day.
>
> (Record, 298.)

And again on cross-examination:

> Q. Mr. Yeaton, did you mean to testify that there was no damage whatever to the bulkhead?
>
> A. I never saw it.
>
> Q. I say, do you swear that there was no damage to the bulkhead?
>
> A. It might have been smoked, but I never saw any trace of burning on the bulkhead.
>
> (Id., 304.)

We submit that this evidence is strong and convincing and, coupled with the testimony already referred to of Captains Baird, Wallace and Wylie, and also the testimony of Preece, the boss stevedore, clearly shown to be disinterested, who subsequently unloaded the cargo at the very place of the fire (Record, 283, 285), proves conclusively that the *full extent of the fire* is shown by the batten door in evidence (Baird, 268; Preece, 283, 284; Yeaton, 297, 298).

Appellee relies upon the extended protest of the master, admittedly copied from the ship's log (Wylie, 149), as showing the bulkhead of the ship was burned. Both Captains Wallace and Wylie explained fully and clearly the statements contained in this protest (Wallace, Cross Inter. 7, Record, 104; Answer, 120; Wylie, 150, 151. See also Capt. "Wallace's" letter to his owners dated April 19, 1911, Record, 159, 160), and we submit that their explanations are satisfactory. When the circumstances are considered, under which the signatures of these men were secured to this protest, and when it be considered that it was prepared for use against the appellant in this case *(although it cannot be legally so used, 17 Cyc.*

405, 406),—we believe it will be given heed only as presenting a possible explanation of Surveyor Walker's extravagant statements as to the extent of the fire.

Walker's survey report, in the exact words of the protest (Survey, Record, 22; Protest, 103), contains the statement that the *bulkhead* was burned, and, as this statement was taken from the ship's log (Record, 198, 199), it is altogether possible that the oral testimony of a busy man, such as Mr. Walker undoubtedly is, would be affected, if not entirely controlled, after the length of four or five years, by the statement contained in his survey, even though he states that an independent survey was made. He says:

> I have a strong recollection after reading my reports on that of the fire, yes, I have a good recollection.
>
> (Record, 199.)

And again:

> Q. You have in your experience since then been pretty busy haven't you, making surveys of ships?
>
> A. Yes, busy all the time, practically speaking.
>
> Q. You are not very zealous to retain these little matters of detail in your mind for any considerable time, are you?
>
> A. No, after I report on matters, as a rule they pass from my sight.
>
> Q. You rely on your reports to refresh your memory?
>
> A. Yes, sir, otherwise I would get them mixed.
>
> (Id., 206, 207.)

And right here we call attention to one matter where the witness, because of the lack of a report to assist

his memory, did get "*mixed*". In regard to the method of ascertaining the amount of creosote lost, he says:

> Q. Explain how you arrived at the number of gallons of creosote which were lost.
>
> A. The way we arrived at the loss, we took the invoice number of drums and what each should have contained.
>
> Q. That gave the total number of gallons?
>
> A. Yes, that should have been there. And as the drums were emptied into a tank, an empty tank, and as the drums were emptied the amount was shown by the meter reading.
>
> Q. Were these readings taken under your supervision?
>
> A. Yes, sir.
>
> (Record, 190, 191; see also 214.)

Appellee's superintendent, on cross-examination, says:

> Q. Was any meter used in the measurement of the creosote from the damaged drums?
>
> A. No.
>
> Q. It was simply dumped or poured from the drums into a receptacle known to contain so many gallons and measured in that way?
>
> A. Yes.
>
> (Beal, 75.)

And again:

> Q. Were those full drums measured in the same way that the creosote in the partially damaged drums were measured?
>
> A. Yes.
>
> Q. No meter was used?
>
> A. No.
>
> Q. Have you a meter there for the purpose of measuring creosote?
>
> A. We did not at the time I was there.

Q. You were there and would know if they had one?

A. I would have known it.

(Id., 78, 79.)

In view of all the circumstances, it is evident, that, on the question of the extent of the fire, Walker was testifying, not from a remembrance of his inspection of it, but from the statement embodied in his survey, which statement was copied from the ship's log. If the court takes our view, and holds that a preponderance of the evidence shows that the "Sardhana's" door represents the extent of the fire, then, of course, Walker's further statement, that the repair value of the damage done amounts to one hundred and fifty or two hundred dollars (Record, 206), cannot be credited.

Appellee also relies upon the evidence of F. D. Beal that the bulkhead was burned (Record, 66). It will be seen that this witness is not very positive in his statement as to the extent of the fire. He is, however, positive in his opinion that the fire started in but one place, that is, that there was but one seat of fire (Id., 84); and he makes a rough sketch to illustrate his remembrance of its extent. Bearing in mind that the fire had but one place of origin, if the court compares Beal's exhibit (Id., 96) with the physical evidence as represented by the door itself, it will be apparent that the witness is mistaken in saying that any of the bulkhead was burned. If there was but one seat of fire, the *door clearly shows where it was,* as well as the *impossibility* of its having extended to the bulkhead. If Beal's sketch

illustrates his testimony, the door itself refutes both sketch and testimony as to the fire having reached any part of the batten bulkhead.

The entire situation resolves itself into the following: A fire took place on the "Sardhana" which burned or charred a batten door leading from the 'tween decks into the lazarette, but only to such an extent that it was not considered worth repairing, and never was repaired. Was it within the contemplation of the parties, in view of the law of the Glenlivet case, that such a trivial fire, happening nine days after the voyage of the vessel had been completed, should open the warranty of the F. P. A. clause?

As has been shown in the opening of this brief, under what is agreed to be the law of England, the expression *"burnt"* must be construed in pari materia with the word *"stranded,"* and the words *"stranded, sunk or burnt,"* when used in collocation, require that there should be a substantial burning of the vessel as a whole. However, the claim here is made that, because of this condition of the law, and in order to avoid its effect, the expression was changed from *"burnt"* to *"on fire."* Assuming, therefore, for the purpose of this argument, that such was the fact,—in view of the clear expression of the judges in the Glenlivet case that the exceptive words of the memorandum must be read in collocation with each other,—we reiterate that the purpose sought to be accomplished by the change fails. The change should and could have been made so clear as to leave no ambiguity as to its purpose to override the principle

which had been laid down in the Glenlivet decision. It is one matter to agree that a particular average loss will be paid *if the vessel as a whole is on fire,* but quite a different matter to say that it will be paid if any kind of a fire occurs, even one so trivial as to be considered by the vessel's owners undeserving of repairs, though the cost of such repairs is covered by hull insurance.

We beg to again repeat the opinion of Mr. Gow on this point:

> Since the issue of the (Glenlivet) decision some slips have had the words "on fire" *added* to "burnt", confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision. (Italics ours.)
>
> * * * * * * *
>
> But will not exactly the same principle that was applied in the interpretation of "burnt" be applied to that of "on fire"? For it is not a question of the extent of the effect of ignition * * * as far as the memorandum is concerned, is it not all the same whether you say *"burnt"* or *"on fire"* so long as the principle of "substantial burning of the ship as a whole" is applicable?
>
> (Gow, p. 181.)

It will be noted that Mr. Gow's opinion is based upon slips having the word *"on fire" added to "burnt",* so that the clause reads: *"Warranted free from particular average unless the vessel be stranded, sunk, burnt, on fire, or in collision"* (See Beckett, Record, 232). If, changed to read as above, Mr. Gow's opinion is that the construction would still fall within the principle of the Glenlivet case, then, a fortiori, that principle controls if the word *"burnt"* is omitted, and the clause

reads simply *"on fire"*. Leaving in the word *"burnt"*, and *adding the words "on fire"*, would bear some slight inference that the former exception was intended to be modified by the addition, but when the words "on fire" *substitute* the word "burnt" no such inference is possible, if the principle of the Glenlivet case be adhered to. Nothing could have been easier than for the applicant for insurance to have relieved the situation from all chance of ambiguity by saying to the underwriter: "You pay for a particular average *loss* if the ship be stranded, sunk or on fire, the fire to be of such a character as to work substantial damage to the structural part of the ship." Or, if he wanted even better protection than such a clause could give him, as in the case at bar, he could have added: "The fire to be of any character, whether substantial or trivial", or *"The extent of the fire to be immaterial."*

We find in the very policy sued on, and in the F. P. A. clause, a similar limitation affecting the word *"collision"*: Warranted free from particular average unless the vessel be in collision * * * *"the collision to be of such a character as may reasonably be supposed to have caused or led to damage of cargo."* This particular limitation is in the interest of the *insurer*, but it is submitted that, if the *assured* was seeking an amplification of the *"burnt"* exception of the clause, it was equally incumbent that such intention should be made clear.

In the Glenlivet case the English courts resolved the ambiguity found in the use of the word "burnt" in favor of the underwriter, and held that the ship must have

been *on fire* as a whole, thereby excluding from the meaning of the word *total destruction of the whole.* Is it not, therefore, obvious, in view of the principle laid down, that the expression *"on fire,"* when used alone, should receive the same construction? When the idea of total destruction is excluded from its meaning, the word "burnt" is no more than the past expression of the same fact or idea expressed by the words *"on fire".* In this view, to say that a vessel is burnt means that the vessel *has been* on fire, and nothing more.

From the decision of Judge Hanford in this case on exceptions (184 Fed. 949), as also from Judge Netterer's decision, it is apparent that both overlooked *the narrow meaning* given to the word *"burnt"* by the Glenlivet decision, for otherwise they could not have said that the words *"on fire"* are not synonymous with the word *"burnt".* Judge Hanford, however, is entirely correct in his statement if, to the word "burnt", is given the definition of *total destruction.* However, this decision, given on exceptions, is of little value at this time. It goes no further than would a decision on demurrer at law, and is based upon the uncontradicted, extravagant allegations of the libel, wherein it is alleged that, in addition to the bulkhead and door, *other parts of the ship were burned* (Record, 5).

Before leaving this subject, we wish briefly to comment on the testimony given before the commissioner in this case by Mr. Beckett of Seattle, who is referred to by the trial court as *"an average adjuster of London, England"* (Record, 328). This young man gives testi-

mony on direct examination which runs as smoothly as a well ordered watch. His qualification as an average adjuster consists of a connection with the firm of Johnson & Higgins since September, 1911, and before that for a period not revealed with two English concerns. Based on this experience of unrevealed duration, despite objection of counsel that he is not qualified, the witness proceeds to say that it is the practice of English adjusters to consider the warranty in the F. P. A. clause opened if a structural part of the ship is on fire, and that it does not depend on the extent of the fire at all. When asked as to the number of cases adjusted by him with the F. P. A. clause in the policy, he says it would be impossible to state, but that there have been a considerable number (Record, 229); that never to his knowledge has his view of the matter been contested by underwriters (Id., 229); that to his knowledge the words *"on fire"* were *added* to the policies after the decision in the Glenlivet case in 1893 (Id., 230); and finally, that he considers the warranty open in the present case if the bulkhead door was burned (Id.). At the very beginning of his cross-examination his qualification as an expert receives a rude shock, when it turns out that at the time of the first use of the words *"on fire"*, after the decision in the Glenlivet case in 1893, he was at school, unconnected with average adjusting and knew nothing about the Glenlivet case (Id., 231). By way of apology, however, he says that these matters are covered by text books (Id.). He then testifies that his and Mr. Gow's construction of the expression "on fire", as

contradistinguished from the expression "burnt", are alike, and that Gow agrees with him that the two expressions should be given *different constructions* (Id.). The substance of the witness' testimony may be summed up in the following:

> Q. * * * Do you mean to say that it is the practice that the warranty is opened where any part of the structural part of the ship is on fire, no matter how minute the fire is?
>
> A. To the best of my knowledge and belief, yes.
>
> (Record, 236.)

Testing his own experience in the matter, the most trifling fire with which he has been connected, and where, by the common consent of both the assured and the underwriter, the warranty was opened, occurred in January, 1912, on the ship "Watson", and the fire loss totaled from $700 to $800 (Record, 240, 241). In attempting to test his knowledge of the matter as an expert, aside from personal experience, the witness becomes increasingly unsatisfactory, for he says his knowledge *"is more or less confined to the adjustments I have made", "I have no means of hearing of them"* (referring to trivial fire *losses* which, by common consent of the assured and underwriter, opens the warranty) (Id., 241).

A careful reading of Mr. Beckett's testimony seems clearly to indicate an entire lack of knowledge or experience, which could fairly be held applicable to the facts of the case at bar. The opinion which he expresses, and which he assumes to be in harmony with Mr. Gow's, but

is not, refers to policies where the words "on fire" have not been *substituted* for "burnt", as in the present case, but have been *added* to it.

> Q. That this expression "on fire" in modern policies is substituted for the expression "burned"?
> A. No, it is included that way. "Burned" has not been left out of the clause, but "on fire" has been added.
>
> * * * * *
>
> Q. How would the F. P. A. clause read?
> A. Warranted F. P. A. unless stranded, sunk, burned, on fire or in collision.
>
> (Record, 232.)

Here, then, is the situation: The Glenlivet decision establishes the principle that where the word "burnt" is used in collocation with the word "stranded", then, the ship must be on fire as a whole. This because of the established construction of the meaning of the word "stranded", as formerly used alone in the warranty. If the assured then is looking for a fuller protection than that given by the principle of the Glenlivet decision, it possibly might be successfully contended that such hope and expectation is realized by *adding* to the expression "burnt" the words, "on fire", but when the word "burnt" is not so attempted to be enlarged, but is substituted by words of exact analogy (when the idea of something less than total destruction is intended to be expressed), then, we submit there can be no possible ground for holding that the substituted words, read in collocation with the word "stranded", mean anything more or less than did the word "burnt".

III.

THE CLAIM FOR THE VALUE OF THE FOUR DRUMS LOST AND SALVAGE EXPENSES CANNOT BE SUSTAINED BECAUSE (a) THE LIGHTER IN QUESTION WAS FURNISHED BY THE ASSURED AND WAS UNSEAWORTHY, AND (b) THE ASSURED WAS NEGLIGENT IN LEAVING IT OVER NIGHT ALONGSIDE THE VESSEL, FULLY LOADED AND UNATTENDED.

During the course of discharge, and on the night of Saturday, November 22nd, a fully loaded barge, moored alongside the "Sardhana" (Preece, 278), capsized completely, precipitating its load into the bay. Although appellee's libel is framed to cover the loss of four drums and salvage expenses, as a particular average *loss,* made possible by the fire, and the trial court seems to follow that lead, still, we contend, that appellee's sole ground for recovery of these particular damages rests in the provision of the F. P. A. clause reading: *"Each craft or lighter to be deemed a separate insurance"* (see policy, original, Libelant's Exh. "A", also printed record, 9). Were it not for this clause, and if appellee were confined to the contention shown by the libel that the fire of November 18th deletes the warranty, so as to let in this particular average loss, its case on this claim would be desperate, for the reason that the exception extends to cover only goods on board the ship at the time the fire occurs,—a point which we will take up more fully later on.

In *Thames & Mersey Marine Ins. Co. v. Pitts,* 7 Asp. (N. S.) 302, we find a policy, issued by the appellant in the case at bar, construed, where the question was,

whether the F. P. A. warranty was opened by a *stranding* as to goods not on the vessel at the time of stranding, although at risk under the policy on a lighter, from which they were subsequently loaded on the ship. The policy contained the usual warranty against particular average *losses,* with the exception *"unless the ship or craft be stranded"*. It further contained the clause, *"Each craft * * * to be considered as if separately insured"* (Id. p. 306). Day, J., says:

> "The goods are insured in the craft while in the craft; and they are insured in the ship while in the ship, and not in the craft. To my mind, the insurance while in the craft is covered by the policy, and it is by the policy applicable to the craft, and *all the incidents of the risk, and all the incidents of the insurance are applicable to the craft.* (Italics ours.)
>
> "* * * when the ship was stranded the goods were in the craft and the only stranding for which the underwriters would be responsible would be for stranding in the craft." (Id. 306.)

The trial court cites this case against the appellant (Record, 331), but it is difficult to determine, from the decision, what point its citation is intended to cover. As it was one of the cases on which we depended at the trial, perhaps its use against us was an inadvertence. At any rate, the case, we submit, establishes two or three very material points:

1. That the exceptive words of the F. P. A. warranty only affect goods on board at the time the warranty is opened;

2. That under the terms of the policy in suit the exceptive words of the F. P. A. warranty apply to the lighter *separately,* and that the stranding or sinking or burning, as the case may be, must be of the lighter, and that otherwise the loss of the goods on the lighter must be *total* or there is no liability.

As we have intimated, this latter was not the theory on which appellee's claim is based, but we submit it is clearly the only theory upon which it can recover for the four lost drums and salvage expenses.

The court in the Pitts case, in holding that the contract of insurance was separate as to the goods while on the lighter, very properly says, that *"all the incidents of the risk and all the incidents of the insurance are applicable to the craft".* One of the very material incidents of the contract is the implied warranty of seaworthiness for which we contend. Instead, however, of recognizing the express provision of the policy in suit, making each *craft or lighter a separate insurance,* to which all the incidents of the contract are applicable, the trial court, on the sole authority of *Lane v. Nixon,* an English case decided in 1866, and cited by text books, holds that the implied warranty as to seaworthiness does not extend to lighters.

In *Lane v. Nixon,* decided on demurrer, there is no evidence to show that the policy contained the controlling provision found in the contract in suit, namely: *"Each craft or lighter to be deemed a separate insurance";* therefore, no reason for the construction that *"all the incidents of the insurance"* were applicable to the lighter. Furthermore, it will be seen that the

reason for the rule laid down in this old case is not present in the case at bar. There it was said: "*The owner of the goods has no means of knowing anything about the lighters or other craft to be employed,* * * *"; while here the owner was the receiver of the goods at the place of the termination of the insurer's liability, and received them from the ship's tackles on to the lighters, which it furnished and controlled in the loading and transporting from ship to shore. Appellee's conduct, in having a survey made of the particular lighter in question, is clearly a recognition of its obligation to furnish one fit for the purpose to which it was put.

An American case, cited in the text books on this subject of implied warranty of seaworthiness covering lighters, is the old case of *Van Valkenburgh v. Astor Mutual Ins. Co.*, 1 Bosw. (N. Y.) 61, in which it was held that the assured *could not* recover for losses caused by the unseaworthiness of flat boats used on a portion of the voyage.

In a recent English case, involving a contract of affreightment, where *Lane v. Nixon* was expressly relied on by counsel, the court held squarely that the implied warranty of seaworthiness *did* extend to the lighters used in the course of transshipment of the cargo, and this irrespective of whether the lighters are furnished by the shipper or not, and irrespective of whether the contract of shipment contains the clause that the carriage of the goods in such lighters is to be "*at the risk of the owner of the goods*".

The Galilio, XVIII Com. Cas., Part III, p. 146 (Advance Sheets).

This case, decided in February, 1913, is the last word on the subject and, although it involves a contract of affreightment, we submit, that the implied warranty of seaworthiness in such a contract is no different from that in a policy of marine insurance.

The Vortigern, VIII Asp. M. C. 523.

Before going into the facts, we call the court's attention to the point that, irrespective of the question of an implied warranty of seaworthiness, the appellee cannot recover unless it shows that the lighter capsized because of a peril of the sea, because otherwise the *loss* did not occur through a peril insured against, and the burden of proof on this point lies with appellee.

If we are right in contending that the assured's claim must be based on the separate insurance lighter clause, then, the sole ground on which this lighter liability rests is that the loss, under this separate risk, was (1) total, and (2) caused by a peril insured against. These two facts must be affirmatively shown by appellee, and when this showing has been made then appellant's defenses, which must also be affirmatively shown, are unseaworthiness and/or negligence.

As to the obligation of appellee to show a total loss of the lighter load,—we admit, that, irrespective of the result of the salvage efforts, it has made this showing. As to its obligation to prove that the loss was caused by a peril insured against, we submit that it has failed.

The libel alleges that the barge was *"capsized during a heavy gale"* (Record, 5). With reference to this *allegation,* found on the first page of the average statement

(original exhibit, Libelant's Exh. "M"), it is undoubtedly taken from a copy of superintendent Beal's affidavit incorporated into the average statement at p. 4. Of course, neither the statement in the pleading, nor Mr. Beal's affidavit, is evidence and we, therefore, propose to refer the court to the evidence offered to establish the fact alleged, and necessary of proof, that the loss occurred through the capsizing of the barge during a heavy gale.

Appellee's superintendent, Beal, who was on shore, on direct examination says: "There was a gale that night" (Record, 69). "My recollection is that it was a southeast wind" (Id. 70). Appellee's assistant manager, E. D. Rood, in answering a direct interrogatory, says:

> This lighter was capsized on account of the unusually heavy weather at this time. The seas and swells rolled in and it was impossible for the lighter to weather the storm.
>
> (Record, 135.)

The 17th interrogatory, to which the foregoing is an answer, was so general in its character on this point (Record, 127, 128) that it gave no notice whatever of the answer which it was intended to elicit, and as a consequence no direct interrogatory was directed to meet the undisclosed question of a sea peril. In view of the circumstances we believe the court will give but little weight to the statement, as it must appear from all the evidence in the case, touching the subject, that the witness was not testifying to his own knowledge when he

said, "The seas and swells rolled in and it was impossible for the lighter to weather the storm".

The evidence of Mr. Beal given at Portland, and the evidence of E. D. Rood given at Los Angeles, is the *only* affirmative evidence produced by the appellee to establish that the accident to the lighter was caused by a peril of the sea. On cross-examination of *appellant's* witness, Preece, it is shown that at *Seattle* on the night in question there was "quite a little blow" (Record, 292) (see also cross-examination of appellant's witness, Tuttle, Record, 259).

This is the evidence of the case which is offered to prove a total loss through a peril of the sea; giving to it the fullest possible interpretation, we submit that no loss through a sea peril has been shown. Neither Beal nor Rood were on the "Sardhana" that night, nor on the lighter, and neither of them could have known anything about the conditions as they existed in Eagle Harbor, where the "Sardhana" and lighter were moored. It is not a necessary inference that, because there is wind on shore, or in Seattle, there must have been one on the water at Eagle Harbor, a fortiori, one affecting this lighter lying inshore alongside the "Sardhana", nor is it a necessary inference that the gale, witness Beal speaks of, capsized the lighter. The only witness in the case who occupied a position which would enable him to give evidence of value as to the weather that night was Yeaton, the apprentice, for he alone of those who testified on the subject was on board the vessel, and would have known of any storm or gale or wind, if there had

been any, affecting the lighter. Yeaton knew nothing of any such weather.

This naturally brings us to a consideration of appellant's proof of unseaworthiness.

Were it not for the lower court's decision, we would say that, under the terms of such a policy as the one in suit, the proposition would be elementary that the warranty of seaworthiness extends to the lighter. Judge Netterer, it is true, held that "there is no testimony before the court to establish" unseaworthiness (Record, 330), but such finding being unnecessary, after holding as matter of law that the warranty does not extend to lighters, we conclude it was based on a superficial examination of the record,—no testimony having been taken before the court.

As the contract of affreightment, between the appellee and the carrier, evidently required delivery to be taken at the ship's tackles (Baird, 276), and as the inference to be drawn from the bills of lading, issued by the ship, clearly points to the same thing, and as the appellee undertook the cargo's transportation from ship to shore (Record, 69); it was clearly its duty to furnish only such lighters for this purpose as were reasonably fitted to withstand the ordinary vicissitudes of the place and use to which they were to be put. They must be tight, staunch and strong so that, when loaded, they would safely bear their burdens. They must not only be free from leakage and tight in their seams, when the displacement is light before loading, but also after loading, when the displacement would be greater, and if,

when loaded, they were to be temporarily left over night and used as unattended store houses, they must be fitted so as to withstand such winds or sea as were likely to be expected in Eagle Harbor.

It is our contention, even assuming that the lighter in question did not *seem* to leak when *unloaded,*—as she became submerged by the weight of cargo, the water slowly passed into her hold through newly submerged and leaking seams in her sides (Preece, 290); that the water thus coming in gradually gathered on one side, causing a list that increased during the night to a point where barge and cargo turned turtle. We contend, and the evidence is clear, that in no other way could the barge have capsized, and there could not have been a shifting of the cargo, to cause capsizing, because of the peculiar construction of the drums and the method of loading them.

Witness Preece, the foreman stevedore, loaded the barge on Saturday (Record, 278, 288), and testifies as to the manner in which the drums were placed on the lighter "to keep them from shifting" (Id.). The loading was finished between 4 and 5 o'clock in the afternoon (Record, 279) and, although it was the custom of the creosote company to tow their lighters away from the ship after they were loaded (Id.), on this particular occasion it was not done, but she was left for the night fastened to the vessel's side with the ordinary mooring lines (Id.). The lighter in question was moored and left on the port side of the "Sardhana", and the donkey engine used in unloading the drums from the ship, on the starboard side (Record, 281).

When asked his opinion as to the likelihood of stress of wind or sea capsizing the lighter, Preece says:

> A. If there was sea enough came in there she might capsize, but the way the vessel was lying, and the way the barge was alongside, I don't believe any sea ever came in there that would capsize that barge, provided that there was no water in her, she was not leaking.
>
> (Record, 282.)

On cross-examination the witness testifies that when fully loaded the barge had from a foot to eighteen inches of freeboard (Record, 288), and that when he left her that night she was upright, and on an even keel (Id., 289). When he saw her next she was bottom up and full of water (Id., 290).

As we have stated, the witness who had the most intimate connection with the actual capsizing of the lighter, because he was the only witness on board the "Sardhana" at the time, was Yeaton. He says:

> Q. Do you know when she capsized?
> A. Early in the morning, that is all I know.
> Q. How did you have knowledge of her capsizing?
> A. I heard it go.
> Q. You heard what?
> A. I heard her turn, what I supposed to be her turn.
> Q. What was the noise like?
> A. It sounded to me like drums hitting the ship.
> Q. How long did the noise last?
> A. A few seconds.
> Q. Was the ship in any stress of weather at the time?
> A. Not that I could see, not that I remember.

Q. What kind of a harbor was this where the Sardhana lay—exposed or protected?

A. There is quite a little bay, but it is quite sheltered from the Sound itself, only a narrow entrance.

Q. Was this lighter which was capsized in an exposed or a protected position?

A. Well, from anything coming in from the Sound she was well sheltered.

Q. Was it exposed to anything else, was it exposed to any sea or wind?

A. Just the amount of sea that could get up in the bay, that is in Eagle Harbor.

(Record, 294, 295.)

Cross-Examination:

Q. What was the condition of the weather on the night this scow capsized?

A. I have no particular recollection of it being very bad or very fine.

Q. Have you any particular recollection at all what the weather was. A. No.

Q. You do not remember?

A. No. Had it been bad I should think I would remember it because we probably would have had trouble with our own mooring.

(Id., 308.)

Another disinterested witness whose testimony rebuts the contention of loss from a sea peril, and tends to establish unseaworthiness, is H. C. H. Tuttle, the engineer for the Washington Stevedoring Co., whose barge, with the donkey engine on it, was moored on the starboard side of the "Sardhana". He testifies as follows:

Q. On the occasion of the scow capsizing, did any mishap happen to your scow on which the donkey engine was? A. No, sir.

* * * * * * *

Q. Mr. Tuttle, as the lighter lay on which the creosote was loaded on the occasion when the scow capsized, was that lighter exposed to any wind or sea?

A. You mean the one with the drums on?

Q. Yes.

A. No. It was not exposed near as much as the scow I had. It was out of the weather. The weather had to hit the ship first.

(Record, 248, 249.)

Capt. David Baird, after testifying that the "Sardhana" was anchored from 50 to 100 feet from appellee's dock, and that the donkey engine was moored to the starboard and the lighter to the port side (Record, 264), says:

Q. What can you say with reference to its (Eagle Harbor) situation regarding sea and weather?

A. Oh, it is a landlocked harbor, perfectly safe, I should say.

(Record, 265.)

After testifying to the manner in which the drums were loaded on the scow, he says:

Q. Would it have been possible in your opinion for a scow so loaded to have capsized fore and aft?

A. Impossible.

Q. So that if this scow did capsize it must have capsized athwartships? A. Yes.

Q. In your opinion would it have been possible for this scow to have capsized athwartships through such stress of weather as might have been possible where it lay on the port side of the Sardhana in Eagle Harbor? A. No.

Q. If the scow did capsize what in your opinion then was the cause of its capsizing? A. Water.

Q. Water where? A. In the hold.

Q. You have stated in your opinion it would be impossible for that scow to have capsized athwartships through such weather as might be possible where she lay, through the cause of weather alone or sea, why?

A. Never any sea in there, and besides I suppose the scow could stand up in there until the bottom drops out.

(Record, 266, 267.)

Cross-Examination:

Q. What did you mean, captain, when you stated in answer to counsel in your direct examination that the lighter could not have capsized under any conditions of weather over there?

A. Well, lying alongside the ship she could not.

Q. She could not? A. No.

Q. Under any conditions of weather? A. No.

* * * * *

Q. There is no condition of weather which would cause the ship to have considerable motion over sideways, is there? A. No.

Q. Could not have any motion sideways?

A. Not with that wind.

Q. Not enough to cause this scow to capsize?

A. No..

(Id., 275, 276.)

Appellant's next witness on the subject was Capt. S. B. Gibbs, agent and surveyor for the San Francisco Board of Marine Underwriters. He said that for 11 years he had been going over to Eagle Harbor on the average of about twice a month (Record, 313). He then testifies as follows:

Q. State whether the harbor of Eagle Harbor is protected or unprotected?

A. We look upon it as a protected harbor.

Q. Are there any winds, or is there any sea, that would have affected this lighter as she lay alongside the Sardhana?

A. I do not think she would have been affected by any wind or sea in that position in which the ship was moored, and the barge moored on the inshore side.

Q. Why, captain?

A. Because it is close into land on one side, and the ship on the outside, and the creosote works on the other side, and it seems to me pretty hard for the wind to get up any sea that would affect the barge.

Q. What in your opinion would cause the capsizing of that barge?

A. I should say it must be water in it.

Q. That is, the barge must have had water?

A. The barge must have had water, must have been leaking.

(Record, 313, 314.)

The contention is made that this barge was surveyed by Mr. Walker *after* its capsizing, for the purpose of ascertaining its seaworthiness, and that as a result of such survey Mr. Walker found that the barge did not leak. Our contention is that it is perfectly clear, from Walker's evidence, that the alleged survey was made a number of days after the capsizing, when the barge had been towed to another location, and had been righted and placed on the gridiron. Even had the survey, which was then made, been a proper one, we submit, that the time elapsing between the capsizing and the date of the survey, destroys the value of the survey, in the absence of evidence showing what had been done with the barge in the meantime (see *North American Dredging Co. v. Pacific Mail S. S. Co.*, 185 Fed. at p. 703). However

this may be, it is perfectly clear that Capt. Gibbs' criticism of Mr. Walker's survey is well taken (Record, 155, 156). We give here the evidence of what it consisted, and it should be borne in mind that the evidence refers to *two* alleged surveys,—one made immediately *after* the capsizing, and one made days after that, when the scow was on the gridiron:

> Q. Mr. Walker, what was the condition of this scow at the time you made this examination and survey?
>
> A. I think it says in there (referring to his report) that she was bottom up.
>
> Q. Did you examine to see whether she made any water or leaked?
>
> A. I cannot say, I cannot remember. (Examines Exh. "J"). She was tight. There was nothing the matter with the barge. I examined her afterwards.
>
> Q. She could get no water in her?
>
> A. No, she was not leaking.
>
> Q. When did you examine her, how long after she capsized?
>
> A. I cannot say. I cannot remember exactly. When I examined the barge she was righted up on the gridiron.
>
> (Record, 192, 193.)

Cross-Examination:

> Q. Now, I want to call your attention to your survey of the barge or lighter that was capsized, will you state when it was after the capsizing of the barge, assuming that the capsizing of the barge was on the 21st of November, how long after that was it that you saw the barge yourself?
>
> A. I stated in the report that I examined the barge. I examined the barge the same date.
>
> Q. You examined the barge the same day it was capsized?

A. She was bottom up rather.

Q. Where was she when you examined her?

A. If I remember rightly she was still made fast alongside the ship.

Q. Is that where you made your survey of her?

A. Where I made my first examination of her.

Q. What did that examination consist of?

A. Simply looking at the barge as she lay capsized.

Q. You did not get much information?

A. No, none.

(Record, 207, 208.)

Q. Now, after this first visit to the barge I understand you saw it again?

A. I saw the barge again, yes.

Q. Where was it then?

A. I think the barge was at West Seattle at that time. I would not swear it was.

Q. Was (it) righted when you saw it?

A. The second time, yes.

Q. How long afterwards? A. I could not say.

Q. A number of days? A. I could not say.

Q. What does the report say?

A. I do not pretend to remember five or six years. Yes, the report shows it was some days after. The report covers from November 23rd to December 12th.

Q. So that it was probably around December 12th that you made this further examination?

A. No, I could not say the date of it. I would not attempt to say it.

Q. It was some days after you first saw it?

A. Yes, they towed her away and righted her and she was on the gridiron.

Q. What was the examination and survey you made then, do you remember?

A. Well, I walked around the barge and examined her. There was nothing done to the barge and she was not leaking.

Q. That was the extent of your examination, walking around the barge?

A. That was all that was necessary. There was nothing done to her. She was on the gridiron.

Q. You mean she was out of the water?

A. Yes, sir.

Q. You did not do any corking? (caulking)

A. I did not have anything done at all.

Q. That examination formed the basis of your report?

A. That examination was sufficiently close to be sure of the condition of the barge.

Q. It formed the basis of your report?

A. Yes, sir.

(Id., 212, 213.)

Q. This report upon this damage to the barge, was that made from one inspection that you made of the barge when she was on the gridiron, or from all your inspections at various times?

A. I inspected her when she was bottom up and when she was on the gridiron.

Q. And your report was made from these inspections? A. Yes, sir.

(Id., 220, 221.)

If the record shows that the barge was full of water when she was lying in the bay, bottom up, and this water was not pumped out of her, how can it be explained she had no water in her when Walker inspected her on the gridiron, except that after being placed there, the water in her leaked out?

A careful examination of Mr. Walker's testimony will show that he puts no credence in the contention of *"a heavy gale"* affecting the lighter. It is his opinion that *"the harbor in which the ship and barge were moored is considered perfectly safe and protected from*

wind, but on this occasion an exceptionally heavy ground swell swept in". There is no word in the record to substantiate Mr. Walker's opinion touching a "heavy ground swell", to which he attributes the capsizing, in spite of the fact that his only information on the subject refers to the springing up of *"a heavy gale"*.

We now pass to an examination of the testimony of the last witness on this subject, a witness produced by and testifying on behalf of the appellee, Mr. Fred D. Beal, appellee's former superintendent. Mr. Beal testifies at Portland, and on direct examination says:

> Q. Do you know of your own knowledge what caused the scow to capsize?
>
> A. Yes, I know what caused it to capsize. The real cause of the scow capsizing, it got water in it and the water ran to one side of the scow putting it on an uneven keel, and the weight carried it over.
>
> Q. Did she have water in her the night she capsized before sending her out?
>
> A. No, we examined those scows every night and sounded them for water to see that they were on an even keel.
>
> Q. Did you sound her on this night.
>
> A. Yes, we did every night.
>
> Q. Was there any water in her then?
>
> A. Practically none to speak of. There is always more or less water in the bottom of these scows, but there was no water that we would consider as a dangerous proposition to the scow if she had remained as she was.
>
> Q. How did the water have anything to do with her sinking?
>
> A. Additional water got into the scow during the night.
>
> (Record, 70, 71.)

Cross-Examination:

Q. I presume, Mr. Beal, that your statement with reference to the barge capsizing through filling with water was made because that would be the only means that would capsize the barge? * * *

A. That would be my judgment; that would be the only thing that could capsize the barge—her filling with water.

(Id., 79, 80.)

Redirect Examination.

Q. You testified in answer to one of counsel's questions, or rather he asked you if there was any way for this scow to capsize if she had no water in her. I believe you answered that was your opinion that that was the only way she could capsize.

A. This is my judgment.

Q. Mr. Beal, if this cargo of creosote drums had shifted to one side of the barge, wouldn't that make the barge capsize?

A. That is true, if they shifted to one side.

Q. If the barge collided during this gale with the Sardhana causing the drums to all shift to one side of the barge, would not that probably cause the barge to capsize?

A. Yes, if it were possible for the drums to shift to one side of the scow, that it true.

Q. If water got into the hold of this barge, and she listed to one side, the drums would shift before she capsized wouldn't they?

A. In my judgment, no. I don't think it was possible for the drums to shift on the scow until the scow was in the attitude of capsizing, then they would shift and go over with her.

Q. In the attitude of capsizing, you mean with a heavy list don't you?

A. Yes, when she commenced to capsize she would go all at once.

(Id., 91, 92.)

Q. If the testimony of the stevedores with reference to the loading of this scow was that there were two tiers of drums, with one above the other, would it not be possible for this upper tier to shift in heavy weather?

A. Not in my judgment.

Q. What would prevent the upper tier from shifting if the barge collided with a scow or something else during the night during a heavy swell?

A. The bands on the drums would prevent them from sliding. The whole thing would have to move at once.

Q. If she bumped very severely and took a severe list, would the drums shift?

A. No, I don't think that possible; I don't think it possible for these drums to shift only on the capsizing of the scow.

Q. Only on the capsizing of the scow?

A. No, I don't think it possible.

Q. What do you base your notion on—your opinion on—have you had any experience in loading such as would enable you to give such an opinion on that subject?

A. Yes, I have had a great deal of experience in loading and handling scows.

Q. If this scow was afterwards surveyed by a competent surveyor, and it was found she was perfectly tight and not leaking or making any water, how could you say she could possibly capsize?

* * * * * * *

A. I don't believe it would be possible for that scow to capsize unless she did have water in her.

(Id., 93, 94.)

Summed up, the clear preponderance of the evidence in this case points to the fact that the capsizing of this lighter resulted, not from a peril insured against, but solely from its unseaworthy condition. There was no possibility of the cargo shifting, because of the peculiar

construction of the drums and the manner of their loading. The barge's position on the lee side of the "Sardhana", within a protected nearly landlocked harbor, was peculiarly free from the little wind or sea that was possible, and the fact that the donkey engine's scow, less favorably situated, was unhurt, is all convincing evidence to support the contention that the accident was not caused by stress of weather. The surveys testified to are of no value, while the opinion of such disinterested men as Preece, Baird and Gibbs, called by appellant, and Beal, called by appellee, clearly shows that the capsizing was caused by a slow leak which developed after loading. We submit that the record cannot be said to point to any other reason for the accident. Furthermore, the fact that this barge, seemingly tight, staunch and strong, should, without known cause, capsize under the circumstances, raises in itself a presumption of unseaworthiness.

The Southwark, 191 U. S. 1 (48 L. Ed. 65);
The Arctic Bird, 109 Fed. 167;
The Aggi, 93 Fed. 484, 491;
Dupont Nemours v. Vance, 19 How. 162 (15 L. Ed. 584);
Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912, 920, 921;
Forbes et al. v. Merchants Exp. & Transp. Co., 111 Fed. 796.

Insurance Co. of North America v. North German Lloyd Co., 106 Fed. 973, is a case peculiarly in point on this subject, of a presumption of unseaworthiness, be-

cause it is one involving goods lost from a lighter held to have been unseaworthy, because of capsizing without an apparent cause.

In voyage policies of marine insurance, one of the assured's most important warranties is that of seaworthiness, and in the case at bar this implied warranty applies, for the contract of the parties is *"Each craft or lighter to be deemed a separate insurance"*, and, of course, the further point is obvious that, if the court finds that the capsizing of the barge was not caused by wind or sea, or stress of weather, then there can be no recovery; and on either alternative, therefore, the value of the four drums lost and the salvage expenses are not recoverable, for the reason that in the one case the insurance never attached, and in the other the loss was not occasioned by a peril insured against.

The remaining defense which we make to this claim is that appellee was negligent in leaving this scow unattended by any watchman, after it was loaded. From the fact that this loss occurred on Saturday night, or early Sunday morning, it is apparent that it was the intention of the appellee to leave the lighter where it was until the next Monday morning, although the foreman stevedore, Preece, says that it was appellee's custom to tow the lighters away as soon as they were loaded (Record, 279). If, therefore, it was the intention to leave this fully loaded barge (Preece, 278) moored alongside the "Sardhana" from 5 o'clock Saturday afternoon (Id., 279) until the following Monday morning, where it was subject to heavy gales, *according*

to appellee's contention; then it was gross negligence to have left it unattended. It is one thing for the lighter to be used in receiving and immediately transporting cargo from ship to shore, and it is quite a different thing to use it as an unattended store house in a place subject to heavy weather. *Had it been attended,* the water which got into her hold, whether it came from newly submerged seams or from the deck or hatches, would have been taken care of.

In the course of the cross examination of Walker it was suggested that a leak into the lighter's hold, causing a gradual list, would *necessitate* the capsizing of the barge. His reply is: *"No, that would speak for itself and be looked after by the people in time"* (Record, 211). The witness states an obvious truth, although it is an unfortunate one for appellee. The negligence in using and leaving this lighter, when and where it was used and left, relieves the appellant from liability.

The Galilio, supra.

In view of the law of the Pitts case (supra), holding that all the incidents of marine insurance attach to a lighter, where the policy makes each craft or lighter a separate insurance, and in view of the uncontradicted fact that this lighter was left exposed to whatever weather was possible in the locality where she was moored, and that she was left unattended, and capsized by reason of water getting into the hold; we express our total inability to account for the trial court's opinion that the appellee was not obligated to furnish a lighter fit for the service, and furthermore, that the

record shows no evidence that it was unfit. Our contention of negligence, by reason of the lack of a watchman, it will be noted, is ignored by the court.

We pass now to our next contention as to the damages claimed for short delivery of creosote.

IV.

THE ASSURED CANNOT RECOVER EVEN IF THE SHIP WAS LEGALLY ON FIRE BECAUSE IT HAS PROVEN NO DAMAGES.

(a). It has not shown that any creosote was lost;

(b). If any creosote was lost, it was not on board the ship at the time of the fire, and hence the F. P. A. warranty is inapplicable;

(c). It has not shown how much creosote was lost because of perils insured againsi, it appearing that many of the containers were defective when shipped. The burden of proving the quantum of loss caused by perils insured against has not been even attempted by the assured.

We will take up the discussion of the above three subheadings in order:

(a) *The Appellee Has Not Shown That Any Creosote Was Lost.*

It will be noted that the allegation of the libel on this head is "that the master caused said ship and cargo to be surveyed and it was found that * * * 56267.2 gallons of creosote were found to have been lost" (Rec-

ord, 5). This statement, denied by the answer, remains unproven. No such survey was made by the "Sardhana's" master, and the method by which the alleged loss of 56267.2 gallons of creosote is arrived at is shown, first, in the report of Mr. Walker, where it is said:

> After vessel was discharged the officials of the Creosoting Company emptied the 741 damaged drums and measured the amount obtained from same, which proved to be 23650 galls., and as these drums when full contained 109.2 galls. each, which equals 80917.2 galls., the loss is shown as follows:
>
> 80917.2 gals. when shipped
> 23650 gals. discharged
>
> 56267.2 gals. total loss.
>
> (Record, 22, 23.)

As the evidence shows that the ship was seaworthey in all respects (Wallace 34 cross inter., 111, answer 124) when the voyage commenced, and *"there was no water in the ship nor any leakage of the ship"* (Wylie 31 inter., 147, 148), and as the creosote that had leaked into the limbers *"could not possibly get out of the ship"* (Id.), and as all the creosote was delivered to the appellee which was in the ship at the end of the voyage; we contend that because of these incontrovertible facts there could not possibly have been a loss of creosote. There is no suggestion on the part of appellee that the creosote which entered the ship's hold from the damaged drums *leaked out of the ship.* In fact, the direct positive evidence is that it did not:

> 24th Interrogatory. Was said cargo, or any part thereof, lost during the voyage to the port of Eagle

Harbor, and, if so, state the details of how such loss occurred and the amount of such loss.

Answer. There was no loss.

(Wylie, 145.)

* * * My reason for stating that there were not fifty-six thousand odd gallons of creosote lost is that I was on board the ship the whole time, and I know the creosote was loaded in the ship in London and was delivered in Eagle Harbor to the last drop, bar what we washed off the limbers. No creosote could have gone over the side without my knowledge. There was no water in the ship, nor any leakage of the ship. The creosote that leaked went into the limbers of the ship and could not possibly get out of the ship. There was 13 inches of creosote in the well on arrival at Eagle Harbor. That remained until pumped out as before stated.

(Id., 148.)

(See also Wallace, 27 Inter., Record, 101, Answer, 118.)

The uncontradicted evidence is that none of the creosote, which leaked into the hold of the ship, was pumped overboard during the voyage.

Q. During the voyage from London to Eagle Harbor, was there any creosote pumped out of the hold or limbers of the ship into the sea.

A. None.

(Yeaton, 293.)

In fact, the pumps were not used on the voyage at any time. (Id., 307.) And yet, if there was *loss* of creosote from this seaworthy ship, it must have been pumped out of the hold and thrown overboard.

Walker's testimony makes this necessary conclusion quite clear (Record, 217).

There having been no leakage in the hull of the vessel, and none of the creosote having been pumped out at sea, the next matter for investigation is,—What became of the loose creosote in the "Sardhana's" hold after arrival at Eagle Harbor? The evidence on this point is perfectly clear and uncontradicted:

Q. After arrival at Eagle Harbor, was there any creosote in the hold of the vessel? A. Yes, sir.

Q. How much?

A. I could not tell you for certain, but I believe about a foot.

Q. Did you have anything to do with pumping that creosote out? A. Yes, sir.

Q. What did you have to do? A. Pumped it.

Q. You yourself? A. Personally.

Q. State how much of that creosote was pumped out.

A. The only way I could state was giving you the approximate number of days we pumped.

Q. I don't mean that. Was it all or less than all pumped out?

A. Until the pumps sucked; they would not draw any more.

Q. Was there anything done after that to what remained? A. I could not say for certain.

Q. How many days do you recollect pumping creosote out of the hold? A. At least four.

(Yeaton, 293, 294.)

Q. Where was that pumped to?

A. Into empty barrels on the scow.

Q. Where did these barrels come from?

A. From the creosote company, to the best of my knowledge.

(Id., 294.)

Wylie, the "Sardhana's" mate, answering the 26th direct interrogatory, says:

> The creosote which had leaked out of the drums remained in the ship until it was pumped out by the ship's pump through the hose purchased for the purpose into empty barrels supplied by the Pacific Creosoting Co. We pumped down to three or four inches, until the pumps refused to draw any more, and the remainder was bailed out and passed up in buckets, etc., and poured into the empty barrels. They got every drop it was possible to bail out, and then, of course, we had to wash out. That is all the creosote that was lost.
>
> 27th Interrogatory: State, if you can, approximately how much of said creosote which so leaked out of the drums was lost.
>
> Answer: Nothing, but what we could wash out of the limbers. It is really as much as you could wash off the sides of a cement lined chamber,—infinitesimal.
>
> (Record, 146.)

In answer to the 29th direct interrogatory Capt. Wallace of the "Sardhana" testifies to the same effect (Record, 118), and there is not a word of contradiction to be found in the record. As before intimated, even appellee's witness Walker, confirms it (Record, 215, 216). Both Wallace and Wylie were asked their reasons for stating that the claim of the libel is false in stating that 56,267.2 gallons of creosote were lost (Wylie, 31 Inter., 147, 148; Wallace, 34 Inter., 101, Answer, 119), and Capt. Wallace's reason for so stating is as follows:

> My reason for saying that is that the Pacific Creosoting Company took delivery of the cargo and never made any claims against the ship for dam-

> ages to the cargo, or for shortage; the same as they did in the case of the "Jupiter"; the "Jupiter" was discharging the same time as we were. And further from verbal reports from the manager of the Pacific Creosoting Company's plant at Eagle Harbor, made to myself, that the cargo had burned (turned) out in good condition; also from my own knowledge as to the extent of the leakage and the way in which the creosote came out in the pumps and in the buckets.

This evidence of the report made to Capt. Wallace by the *manager* of the Pacific Creosoting Co. was not contradicted, and finds verification in the fact that no claim was made against the ship for short delivery, as there certainly would have been if fifty-six odd thousand gallons of the creosote had been missing. The evidence seems to point clearly to the conclusion that, at the time the vessel had completed her discharge, there was no thought or suggestion on the part of the receiver of the cargo that there was any shortage, and that the shortage, if any, was discovered long afterwards, and at a time when the entire cargo had been in the possession and control of the appellee for some considerable length of time *unmeasured,* and the loss of 56,267.2 gallons was evidently figured out by Mr. Walker, to whom was furnished the measurement of the *whole* cargo from day to day (Walker, 214, 215).

> Q. The creosote from the barrels went into the general tank with the balance of the creosote, did it?
> A. Yes, sir.
>
> (Id., 216, 217.)

In testifying on the subject of measuring the creosote, appellee's superintendent, on direct examination, says:

> Q. Is that a statement of the contents of the damaged drums? (Referring to Respondent's Exhibit Two.)
>
> A. So far as the number of drums concerned, yes. As to the number of gallons I could not say from the data I have at the present time that that is.
>
> Q. Where would that information be secured —in other words, where would the measurement of the number of gallons be made?
>
> A. They would be made at the Pacific Creosoting Company plant, at Eagle Harbor.
>
> Q. You were the superintendent of that plant at that time, were you? A. I was.
>
> Q. Would these measurements be made under your direction? A. Yes.
>
> (Record, 72, 73.)

Cross-examination:

> Q. When were these damaged drums dumped?
>
> A. Approximately some time between the latter part of December and along up to the first of March. This statement was made on March 8th. We have records of dumping there on the "Sardhana" from December 1st—prior to December 1st. I have a record of 24,572 along the latter part of November and up until March.
>
> (Id., 76.)

> Q. You would not want to say that the drums were measured out much before March 8, 1909?
>
> A. No, not positively, I could not state that.
>
> (Id., 77.)
>
> (See also Walker, 214.)

It will be noted that Mr. Walker's report of survey on the cargo loss of 56,267.2 gallons bears date Seattle,

"November 17th-December 28th, 1908", and contains this statement:

> After vessel was discharged the officials of the Creosoting Company emptied the 741 damaged drums and measured the amount obtained from same, * * *.
>
> (Record, 22.)

This would indicate, that prior to December 28th, 1908, these damaged drums had all been emptied and measured, but we submit that Mr. Beal's testimony, just quoted, refutes any such contention. Furthermore, Mr. Beal's letter to his company, *dated Eagle Harbor, December 26th, 1908, contains this statement:*

> As to the quantity of oil received in this cargo we cannot even hazard a guess, as it is practically impossible to give anything within reach of what she brought.

When this letter (Original, Respondent's Exh. 1) was introduced in evidence, Mr. Stevens, the company's secretary, then under cross-examination, testified as follows:

> Q. Was there any doubt at the time of the receipt of this letter as to the amount of creosote which had been received in this cargo?
>
> A. The exact quantity, yes; the exact number of gallons.
>
> Q. Was that uncertain quantity ever cleared up? A. Yes, sir.
>
> Q. Where is the result of that clearing up?
>
> (Witness hands counsel paper.)
>
> Q. You are referring now to another paper, a yellow sheet of paper, dated March 8th, 1909?
>
> A. Yes, sir.

(Paper introduced in evidence and marked Respondent's Exhibit No. 2.)

Q. This last sheet introduced in evidence purports, does it not, Mr. Stevens, to be the result of measuring the creosote left in the damaged drums of the "Sardhana", and nothing more?

A. That is all.

(Record, 180, 181.)

Q. This exhibit 2 is from the files of your office? A. Yes, sir.

(Id., 182.)

On redirect examination the witness was asked when this creosote was measured, and answered:

A. 1908 or 1909. Latter part of 1908 and the first part of 1909.

(Id., 184.)

Bearing in mind that Mr. Walker's survey, which purports to set forth the loss of 56,267.2 gallons, ascertained as the result of measuring by meter the contents of the damaged drums, a process which he says was carried on under his personal supervision, was dated *December 28th, 1908;* it is interesting to note that Mr. Beal says: "I don't think he personally measured the oil that came out of these particular drums." (Record, 73), but that his information on the subject was derived from the statement dated March 8th, 1909, and marked Respondent's Exhibit 2.

Q. You furnished Mr. Walker with copies of your reports, didn't you?

A. Yes, I believe this is a copy of the record we furnished him.

Q. You are now referring to Respondent's Exhibit Two?

> A. Yes, that is my recollection that this is a copy of the report given him, and is compiled or was compiled from our record and figures.
>
> (Beal, 74.)

This evidence is of importance as showing, beyond question, that the figures contained in Mr. Walker's report of December 28th, 1908, showing the claimed shortage of 56,267.2 gallons were compiled before the leaky drums had been measured, and for that reason, are unreliable and worthless. The report is also unreliable in that it does not purport to set forth the number of gallons of loose creosote which were pumped from the hold of the "Sardhana" and delivered to the appellee. Walker says there was a small quantity pumped out and dumped into this same tank (referring to the tank into which the creosote from the damaged drums was measured). He also says that the exact amount of this creosote he cannot tell, and then adds: "*Three or four thousand gallons. * * * that is about what we estimated it.*" (Record, 217.) Mr. Beal says he has no independent recollection of the number of gallons of loose creosote pumped from the hold of the ship (Record, 75), but from his records he is able to locate about 4200 gallons:

> * * * about 4200; whether there are more that came from the "Sardhana", I can't just now state. There are some other notations there, but it is not stated specifically.
>
> (Record, 75.)

The whole matter, we submit, resolves itself into this situation: The loose creosote in the bottom of the

vessel was all turned over to the appellee, together with the drums from which it had leaked. These latter, *partially filled,* were taken to the yard of the appellee, where they remained, in their leaking condition, until emptied some time in March, 1909, and the reason for not measuring their contents sooner, is suggested by the evidence:

> Q. Where were these drums during all this period, from the date of their discharge up to March 8, 1909?
>
> A. They were on the ground near our dumping plant at Eagle Harbor in the yards.
>
> Q. Do you know why they were not measured sooner than that?
>
> A. My recollection was that our storage capacity in the tanks was pretty well taken and we only dumped the drums as we had room in the tanks for them.
>
> * * * * * * *
>
> Q. Do you remember when you measured the full drums?
>
> A. My notations here on the figures extend from that time over into May, 1908—May 13th, 1909, is the last one I have.
>
> (Beal, Record, 77, 78.)

Under these most remarkable circumstances, appellee is attempting to hold appellant to a liability for a loss, *which the record does not show existed at the period of time at which all liability ceased under the policy,*— a loss which occurred, in an unascertained part at least, while the drums were lying, in their leaky condition, for six or eight weeks, on the ground in the yards of the appellee. We submit that, under such circumstances, neither in law or equity can appellant be held respon-

sible for the loss, even if it be conceded that there was one.

This brings us to our next point.

(b) *If Any Creosote Was Lost it Was Not on Board the Ship at the Time of the Fire and Hence the F. P. A. Warranty is Inapplicable.*

If Walker's compilation, showing a shortage of 56,267.2 gallons, be accepted without contradiction, it was obviously brought about by wantonly pumping the loose creosote from the hold of the ship into the sea, or in some other inexplicable way, *before the fire took place.* It is well settled, however, that in order to recover under the F. P. A. warranty, it must be shown that, *at the time of the fire,* the goods were at risk *on the ship.*

26 Cyc., 683;
2 Arnould Marine Insurance, § 887;
2 Phillips Insurance, § 1762;
Gow, Mar. Ins., p. 178;
Roux v. Salvador, 1 Bing. N. C. 526;
Thames & Mersey M. I. Co. v. Pitts, 7 Asp. 302;
The Alsace Lorraine, Id., 362.

It is undoubtedly true, as held in *London Assurance Co. v. Companhia de Moagens,* 167 U. S. 149, and numerous other cases, that the event mentioned in the memorandum need not be *the cause* of the loss, but the memorandum clearly is not opened as to *any* goods not on board when the event took place. Thus in The Alsace Lorraine, supra, a part of a cargo of rice, duly insured, was *jettisoned* owing to severe weather. The

ship then put into Mauritius for repairs, where part of the remaining rice was sold and part held in port for reshipment after the repairs were completed. While being repaired, the vessel stranded. The court held that as the stranding occurred when the goods were *not on board the vessel,* the F. P. A. warranty remained good and the insurers were not liable. In *Thames & Mersey M. I. Co. v. Pitts, supra* (already referred to in another connection), cargoes of maize were insured. One cargo was shipped at San Nicholas and the other was in lighters at Buenos Ayres awaiting shipment,—the policy, however, covering all risk in craft and hence such lighter loads at Buenos Ayres. The vessel stranded while on her way down the river to Buenos Ayres. The court held that, as this latter cargo was not *on the ship* at the time of the stranding, the F. P. A. warranty was not deleted as to it and the insurer was not liable. These two cases make it clearly apparent that the appellant is not liable for the loss of any creosote on the voyage, nor for damage to any drums unloaded before the fire.

Although the trial court recognizes in its decision that this is one of our contentions (Record, 327), and although appellee's libel recognizes the principle by alleging that the fire took place *before* the discharge of the cargo (Record, 5); no further reference is made to it or to the authorities cited in its support, except the citation of the Pitts case at the end of the decision,—a citation exactly contrary to the ruling it is cited to support. It is also to be remembered that the

principle contended for, but wholly ignored, is applicable also to the 427 drums discharged, and in the possession of appellee, before the fire occurred.

If appellant could have established that over fifty thousand gallons of creosote were pumped from the hold of a seaworthy ship into the sea, without necessity therefor, its recourse would properly seem to be against the ship for unlawful conversion, or short delivery, and not against this appellant. In fact, appellee's case on this claim, as well as the court's decision, seems to proceed on the theory of a relation existing between the carrier and itself, under the contract of affreightment, rather than on the contractual obligations created under a total loss policy of insurance with an F. P. A. clause.

This point has needed but brief treatment, yet we submit that it is conclusive, and relieves appellant from the payment of most of the damages claimed.

Our next point can also be briefly discussed:

(c) *The Appellee Has Not Shown How Much Creosote Was Lost Because of Perils Insured Against, it Appearing that Many of the Containers Were Defective When Shipped. The Burden to Show the Quantum of Loss Caused by Perils Insured Against Has Not Been Even Attempted by the Assured.*

The only consideration given to this contention by the trial court, is to be found in its reference to the master's statement as to the *apparent* condition of the

drums when received on the ship, and the application of the principle, governing the statement, found in the bill of lading: *"Shipped in good order and well conditioned"*. It will be seen, that the question now under discussion does not relate to any implied warranty that the goods shipped are seaworthy for the voyage, as is intimated by the trial court (Record, 331), but solely to the question of *appellee's* obligation to show the *quantum* of loss caused by perils insured against.

Of course, it will be conceded, that the opening of the F. P. A. warranty only admits liability for partial loss *caused by perils insured against,* and where there are losses from perils *not insured* against, as well as from perils that are, it is unquestionably the law that the burden is upon the assured to show the quantum of loss caused by the latter. So that, as the assured in this case has made no attempt at a segregation of losses, if it appears some of the creosote drums were defective, and there was a leakage therefrom *before* the vessel encountered any of the perils insured against; then there can be no recovery. We submit, that the uncontradicted and sole evidence in this case, points conclusively to the fact that there was a leakage from defective drums into the hold of the ship before a peril of the sea was encountered.

Capt. Wallace, in answer to the 35th direct interrogatory (Record, 102), testifies as follows:

> A. I can say that I think that part of the leakage was due to the drums not being strong enough, because we observed creosote in the limbers before

we cleared the English Channel, so that all the leakage wasn't due to the drums that were damaged on the passage. As matter of fact I had rejected quite a number of drums in London of this same shipment, and all the drums were of the same general character.

(Record, 119.)

Wylie, the "Sardhana's" mate, in answering cross interrogatory 26 (Record, 157), says:

Answer: The creosote escaped into the hold of the vessel partly on account of the severe weather and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out.

(Record, 157, 158.)

In answer to cross interrogatory 32 (Record, 110), Capt. Wallace says:

A. Some of it did; not all of it. We knew that there was creosote in the limbers before we encountered any bad weather at all; the entry of June 9th covers that.

(Id., 124.)

The witness evidently referred to the log entry of June 6th and not June 9th, for the entry of the former date reads:

June 6th: When it was discovered that the carpenter's sounding rod was very slightly colored with creosote.

(Record, 13.)

Capt. Wallace also in answering the 26th cross interrogatory (Record, 111), says:

A. The damage to the drums was due to the bad weather encountered, except such of the drums

as were inherently defective, and permitted the leakage which we found before the rough weather came on; there was no loss of drums.

(Id., 124.)

In answering the same question on cross-examination Wylie says:

Answer: There was no loss of drums or creosote; the damage done to the drums was partly on account of the severe weather and partly on account of the original weakness of the drums. The leakage of creosote was to some extent due to the screw bungs working out as well as to the weakness of the drums and the severe weather.

(Record, 158.)

We submit that this is all the evidence in the record on the question of how the loss from the drums, through leakage, was caused, and it convincingly shows that there was a partial loss through perils insured against and a partial loss through perils not insured against. Furthermore, when coupled with the foregoing evidence, showing the receipt of defective drums, and a leakage from them before encountering any sea peril, we have the extended protest showing the discovery of loose creosote in the vessel's hold seven days after sailing; we submit that the testimony establishes a situation that precludes recovery, unless appellee can show the quantum of loss of loose creosote caused by a peril insured against. This it has not even attempted.

In *26 Cyc.*, 726, it is said:

"The burden is upon plaintiff to show the extent of the loss; and where it appears that the property has sustained damage from perils insured against

and from perils not insured against, it is incumbent on the insured to distinguish the losses occasioned by the several perils."

In *Heebner v. Eagle Ins. Co.,* 10 Gray 131, the policy exempted the insurers from loss caused by breakage of machinery unless occasioned by stranding. Losses occurred on the voyage both by perils of the sea and by stranding, and it was held that plaintiff could only recover for the loss which it could "*definitely*" show was due to the stranding (see p. 143), although plaintiff claimed that this required an impossibility.

In *Paddock v. Com. Ins. Co.,* 104 Mass. 521, there was a provision in the policy that the insurers should not be liable for a partial loss unless it should amount to five per cent. Partial losses amounting to slightly over ten per cent occurred from two gales. It was held that the burden of proof was on the insured to show a partial loss of five per cent from each gale, and, as the assured was unable to segregate the damages caused, it was allowed only one recovery of five per cent, and this only on the theory that at least one of the gales must have caused this much damage (see p. 535).

The Supreme Court lays down a similar principle, though as to a different subject matter, in *Marcardier v. Chesapeake Ins. Co.,* 8 Cranch 39; 3 L. Ed. 481; 484; as does also this court in *Soelberg v. W. Assurance Co.,* 119 Fed. 23, 31, 33, the court there saying:

"There must be some testimony on which a jury could act in fixing the amount of damages. There

being none, the court did not err in directing the jury to find for defendants."

See also,

Bachelder v. Ins. Co., 30 Fed. 459, 461.

We now discuss our concluding point on the subject of the *damaged drums:*

V.

THE ASSURED HAS NOT EVEN ATTEMPTED TO PROVE THE NUMBER OF DAMAGED DRUMS WHICH WERE ON THE SHIP AT THE TIME OF THE FIRE, NOR THE NUMBER WHICH WERE DEFECTIVE AND LEAKING BEFORE THE VESSEL ENCOUNTERED ANY OF THE PERILS INSURED AGAINST.

This subject can be briefly disposed of because it involves evidence and principles of law already referred to in our discussion of the question of damages applying to the loose creosote.

The only evidence in the case showing the number of drums discharged from the ship, prior to the fire, is found in the extended protest. This shows that the vessel commenced discharging on November 17th, on which day 136 drums were unloaded (Record, 17). On November 18th, up to 5 P. M., when the day's work was finished, 291 further drums were discharged (Id.). As the fire occurred somewhere around 9 o'clock that night, it is evident that, before the fire, there had been discharged 427 drums. As appellee offers absolutely no proof as to how many of these drums, which were thus discharged before the fire, were damaged,

the court will be compelled to hold that they all were, and that, therefore, there can be no recovery for *them,* even though it be held that the fire opened the F. P. A. warranty. Furthermore, in the average statement (Record, 16), we find that the protest under date of September 4th says: *"the drums were found to be adrift and were rolling about in all directions".* Of course, these drums, in order to be seen adrift, could only be in the top tiers, and it is a reasonable presumption that these top tiers were discharged first.

Assuming for the present discussion that there were ~~was~~ 741 damaged drums in all, the failure of appellee, just stated, leaves a possible 314 drums on the vessel at the time of the fire. As to these, we submit there can be no recovery because of the additional failure of proof, which would show the number of these damaged by perils insured against, as distinguished from the number, which the evidence shows, were inherently defective when shipped, and leaked before the ship encountered any of the perils insured against. As to the contention of appellee that the *total number* of defective drums was 741, we simply call the court's attention to the evidence of the witness, Wylie, that he tallied the damaged drums as they came from the vessel, and, although he is unable at this time to give the exact number, still, he is certain, they did not equal 741 (Inter. 30 and 31; Record, 147, 148). This inability of appellant to do more than secure this general denial of appellee's claim, as to the number of drums which were damaged, is but one of many examples of the disadvantage to which the appellant is sub-

jected through the long delay of appellee in bringing its suit.

It will be noted that the further claim is made, that *"four additional drums filled with creosote were also found to be lost"* (Libel, Record, 5), these being *exclusive* of the four drums lost from the lighter, and that the average statement *includes* these four drums in the claimed total liability of appellant (Record, 24). As to these four drums, there can certainly be no recovery for the reason that the record contains no proof of their loss through any of the perils insured against. In fact, as to them, the proof is ominously silent.

Before closing we cannot let pass unchallenged the allegation of the libel, that *"a general average adjustment was made, of which the respondents had notice"* (Libel, par. 5; Record, 6). There is absolutely no proof in the case to show that appellant had notice of the average adjustment. The adjustment is, however, obviously not evidence against the appellant as to the amount of damages, and we believe that we have shown that it was based on erroneous data.

In conclusion we submit that appellee has not shown that the "Sardhana" was on fire, and hence has not brought itself within the F. P. A. clause of the policy. If our contention as to this be not sustained, we think it clear that no damages have been proved, except as to the drums lost on the lighter and the salvage charges, which last losses are not recoverable, both because of appellee's negligence and the unseaworthiness of the lighter. We also submit that this belated suit

should not find favor with the court. Brought long after the fire in question occurred, appellant has been forced to an expense in defending the same which will equal, if not exceed, the amount involved. This is plain from the record. It would have been easier for appellant to have paid this loss, but we believe that, if the record does not show that the suit was an afterthought, it clearly shows that appellee has grossly exaggerated its damages, and appellant could not have paid the claim without stultifying itself and inviting similar impositions in the future.

We submit that the judgment of the lower court should be reversed with costs.

Dated, San Francisco,
October 7, 1914.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.

No. 2459.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, a corporation,
Appellant,
vs.
PACIFIC CREOSOTING COMPANY, a corporation,
Appellee.

No.....

BRIEF FOR APPELLEE

W. H. Bogle,
Carroll B. Graves,
F. T. Merritt,
Lawrence Bogle,
Proctors for Appellee.

Filed this.....*day of October, 1914.*

FRANK D. MONCKTON, Clerk,

By.....*Deputy Clerk*

THE IVY PRESS, THIRD AND CHERRY, SEATTLE

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STATEMENT.

This cause was a suit *in personam* brought by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited, to recover upon a policy of marine insurance covering

a shipment of creosote in iron drums from London, England, to Eagle Harbor, Washington, on board the British bark Sardhana. The shipment consisted of 2,753 iron drums containing 251,134 imperial gallons of creosote, and was loaded aboard the bark Sardhana in the month of May, 1908, at London, England, the loading of the same having been completed on or about May 29, 1908, and the said bark having sailed on her voyage to Eagle Harbor on or about May 30, 1908. On or about the 2nd day of June, 1908, the Pacific Creosoting Company, appellee herein, being the owner of the said cargo, effected insurance with the Thames & Mersey Marine Insurance Company, appellant herein, to the extent of £931 upon the said cargo of creosote in drums, including packages and advanced freight, the total of which was valued at £7,450, and the said appellee on the same day paid to the appellant the sum of £44-18-10 as premium on said insurance, which amount was accepted by appellant and its policy issued and delivered to the appellee, which policy is a part of the record in this case, marked Libelant's Exhibit "A." Said bark completed her voyage and arrived at Eagle Harbor on the 9th day of November, 1908, and on the 17th day of November, 1908, commenced to discharge her cargo into lighters which were brought alongside the ship.

On the 18th day of November, 1908, while said bark was lying at Eagle Harbor discharging her cargo into lighters, a fire broke out in the after tween decks of the ship, which with the assistance of the crews of the ship "Jupiter" and the ship "Hornelen," and with the assistance of the employees of the Pacific Creosoting Company, was finally extinguished.

During the course of the discharging of said bark, and on the night of November 25th, a barge which was moored alongside and upon which 272 drums of creosote had been loaded, capsized, and the contents of the barge were thrown into the bay. Subsequently 268 of the said drums were salved by a diver, and four of the said drums, together with their contents, were entirely lost. At the time said bark commenced to unload her said cargo and during the time of the discharging thereof, Mr. Frank Walker, a marine surveyor, surveyed the said cargo, and found that of the entire original shipment of 2,753 drums, 2,012 drums were delivered full and in good order and that 716 of said drums were delivered in damaged condition and partially empty, and that twenty-five of said drums were delivered in a damaged condition and entirely empty. Subsequently Mr. Walker, with the assist-

ance of the employees of the Pacific Creosoting Company, emptied the contents of the said damaged drums into the creosote tank of the appellee company, and found that of their original contents, said damaged drums containing 80,917 and 2/10 gallons when shipped, only 23,650 gallons were contained in the said drums when delivered to the appellee company at Eagle Harbor and measured, leaving a shortage of 56,267 and 2/10 gallons upon delivery.

This suit is brought to recover from appellant insurance company its proportion of the value of the 741 drums which were delivered in a damaged and worthless condition, and of the 56,267 and 2/10 gallons of creosote which were short upon delivery, and for its proportion of the "sue and labor" expenses incurred by the Pacific Creosoting Company in salving the contents of the lighter which was capsized on November 21. The amount claimed by the insured being that apportioned against the appellant company in a particular average adjustment which was made by Messrs. Johnson & Higgins, average adjusters, and dated May 18, 1909, copy of which adjustment appears on pages 23, 24 and 25 of the record, the said adjustment being in evidence in this cause as Exhibit "B." Upon appellant's refusal to pay its pro rata share of the loss, damage

and expenses incurred by the appellee, this suit was brought.

It is alleged in the libel that the said bark "Sardhana," with the said cargo of creosote and drums aboard, in the course of her voyage encountered gales and heavy seas, causing her to roll and labor heavily and to such an extent that the cargo worked and became adrift, and many of the drums containing creosote were damaged, and that a large quantity of the said creosote escaped into the hold of the said ship, and was subsequently lost, and that upon her arrival at Eagle Harbor the cargo was in a badly damaged condition, caused by the perils of the sea encountered on her voyage. It is then alleged that on November 18, while lying in said port of Eagle Harbor and before discharging said cargo, a fire broke out in the after tween decks of said ship, and burned the bulkhead forward of the lazarette, the door thereof and a considerable portion of dunnage and other parts of said ship; that outside assistance was procured and after considerable difficulty the fire was extinguished. It was further alleged that libelant (appellee) by reason of the said damage to and loss of cargo and "sue and labor" expenses incurred had been damaged in the total amount of $9,570, of which amount re-

spondent (appellant) was liable, under its policy, to the extent of $1,197.20. It is further alleged that said damage to and loss of cargo was caused entirely by tempestuous weather, and was not in any wise attributable to any unseaworthiness of the vessel, and that the damage to and loss of said cargo and the expenses incurred by said libelant in salving same were such as were contemplated in and insured by the policy issued by the respondent (appellant) company.

In its answer appellant herein admitted the execution of the policy, the payment of the premiums, etc., denied any knowledge as to the conditions of the weather encountered on said voyage, the allegations as to the fire on November 18, the allegation as to the capsizing of the lighter on November 21, and subsequent salvage expenses incurred, and generally denied any knowledge as to the extent of the loss sustained by the appellee herein. Appellant specifically denied that the said loss and damage and expenses incurred by appellee were such as were contemplated in and insured by its policy, and denied that it is liable to appellee for any sum whatever.

Appellant affirmatively alleged that by the terms of its policy of insurance, the cargo was warranted free from particular average subject to cer-

tain exceptions, and that appellee's loss, if any, was a particular loss and not within the exceptions. Appellant further affirmatively alleged that said policy was issued in the city of London, Kingdom of Great Britain, and is to be governed by the laws of that kingdom, and that said bark Sardhana was not on November 8, 1908, or at any other time "on fire" within the terms of the policy as construed under the English law.

Upon the issues as thus presented, and the testimony taken in support thereof, the lower court found in favor of the libelant, appellee herein, and a decree was accordingly entered in favor of the libelant, appellee herein, against the respondent, appellant herein, for the full amount of damages as claimed and alleged in the libel herein. From this decree the appellant has appealed, and has filed eighteen separate assignments of error. These various assignments of error, for the purpose of argument, may be grouped as follows:

1. Construction of the F. P. A. warranty in the marine insurance policy sued on herein (Assignments of Error 1-4).

2. Was the Sardhana "on fire" within the construction of the F. P. A. warranty (Assignments of Error 5, 6, 7).

3. Sue and labor expenses (Assignments of Error 8, 9).

4. Extent and cause of loss and damage (which covers the balance of the assignments of Error).

Before commencing our argument we wish to state that we are at a disadvantage in writing this brief, for the reason that appellant's brief in this court has not yet been served upon us, and will not be served in time to allow us to make a logical argument in answer to appellant's contentions. For that reason we are compelled to make an independent argument based upon the various assignments of error which have been filed herein by appellant.

ARGUMENT.

I.

Construction of F. P. A. Warranty In Marine Insurance Policy Sued On Herein.

The question to be argued under this heading was first raised by respondent in the court below (appellant herein) by its exceptions to the libel, which exceptions were argued before Judge Hanford, and his decision thereon is found in volume 184 of the Federal Reporter, page 947. After reviewing the cases, Judge Hanford held:

"The words 'on fire' are not synonymous with the word 'burnt', and the change of phraseology manifestly was not made without a purpose. Having no precedent to follow, this case must be decided according to reason and good sense. The words 'on fire' in connection with a ship do not comprehend necessarily every fire that may be on board of the ship, nor do they have the same meaning as 'consumed by fire,' or 'destroyed by burning.' They are indicative of a happening whereby the ship is endangered by actual fire burning some part of it and necessitating extraordinary efforts to prevent serious damage. A bulkhead between decks is part of the ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm and if not promptly subdued would certainly be destructive, and such a happening would be truthfully described by saying the ship was 'on fire.'" (Record, p. 322.)

The construction of this warranty was again raised upon the final hearing in this case, and argued before Judge Neterer, District Judge. His opinion is found in 210 Fed. Rep., p. 958. Judge Neterer on this point stated (p. 959):

"It is strenuously urged that the fire was not sufficient to delete the 'F. P. A.' warranty and reliance is placed on the *Glenlivet,* Prob., p. 48, decided in 1893, and cited by the Supreme Court of the United States in *London Insurance vs. Companhia, etc.,* 167 U. S. 149, 156; 17 Sup. Ct., 785, 42 L. Ed. 113."

"In the form of the policy previous to the *Glenlivet* case, the word 'burned' was used in

the 'F. P. A.' clause. After this case was decided the words 'on fire' were substituted for the word 'burned.' No case has been suggested where the words 'on fire' have ever been before the courts in the same relation in any other case. The change of the words must have been made for a purpose. These words, as stated by Judge Hanford in passing upon the exceptions to the libel in this case in (D. C.) 184 Fed. 949, are not synonymous. The policy sued on, in the body thereof in relation to 'corn,' etc., uses the term 'sunk or burned,' and in the margin, with relation to the cargo, especially provides sunk or 'on fire,' clearly evidencing a purpose in the minds of the parties to distinguish from the former term and construction. The testimony of Mr. Beckett, an average adjuster of London, England, shows that 'under clauses * * * containing the words 'on fire' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire.' It is clear that 'on fire' used in the policy was not to be considered as was 'burnt' in the *Glenlivet* case. The warranty is drawn in the nature of an exception to the liability of the insurer and is strictly construed against him." Citing this court's decision in the case of *Canton Insurance Office vs. Woodside,* 90 Fed., p. 301, opinion by Judge Morrow. Judge Neterer in conclusion stated:

> "The fire as shown by the evidence, was on some structural part of the ship and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause." (Record, pp. 327-8-9.)

We thus have the decision of two district judges construing this F. P. A. warranty, which decisions

while not, of course, in any way conclusive upon this court, are entitled to great weight.

The F. P. A. warranty, so far as material upon this phase of the case, is as follows:

> Warranted free from particular average unless the vessel or craft or the interest insured be stranded, sunk or on fire."

As stated by Judge Neterer in his decision in the court below, the body of the policy provides, that it is agreed that the corn, etc., "are warranted free from average unless general, or the ship be stranded, sunk or burnt." There is no contention, however, but that the F. P. A. warranty first above quoted, which is attached to the policy in the form of a rider, overrides and controls the provisions in the body of the policy. In the absence of this rider containing the F. P. A. warranty, this policy of insurance, so far as this particular cargo of creosote in drums is concerned is a particular average policy, and covers both total or any partial loss of cargo. This F. P. A. warranty, however, which controls and overrides the other terms of the policy, changes the protection of the policy, so that instead of covering partial losses to cargo, it only covers total loss of cargo, unless one of the excepted events enumerated in the F. P. A. warranty should happen.

Upon the happening of this excepted event the policy is to be construed as though the F. P. A. warranty had never attached, and the insured is entitled to recover for any partial loss sustained.

London Assurance Co. vs. Companhia, etc., 167 U. S. 149 and cases cited.

Unless, therefore, the Sardhana was "on fire" within the meaning of this F. P. A. warranty, the appellee is not entitled to recover under this policy, as the loss sustained by it was only a partial loss.

A contract of insurance is a contract of indemnity, and the effect of a warranty such as the F. P. A. warranty in this case, is to restrict the liability of the insurer, or, as stated by Judge Hanford in the opinion above quoted, it is in the nature of an exception to the liability. This was clearly held by this court in the case of *Canton Insurance Office vs. Woodside,* 90 Fed. 301, where the cases are all cited and reviewed. The form of the policy is furnished by the insurance company. It is drawn by its officers, agents or attorneys, and presumably drawn in such a manner as to leave no cause for ambiguity, and of course is drawn primarily for its own protection and to evidence the intention of the parties thereto. Under such circumstances it is only fair and just that the policy or contract should be con-

strued most strongly against the insurance company, and in case of doubt any restriction upon its liability should be construed in favor of the insured, who, of course, takes the policy in the form in which it is drawn and presented to it by the insurance company.

> "If the company by the use of the expression found in the policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company."
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> *London Insurance Co. vs. Companhia,* 167 U. S. 149.

The Supreme Court, in the case above cited, quoted with approval from the case of *First National Bank vs. Insurance Co.,* 95 U. S. 673, as follows:

> "The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy, for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its own language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."
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> "In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract

> of indemnity, and is to be liberally construed in favor of the insured. *Yeaton vs. Fry,* 5 Crouch, 335 (3 L. Ed. 117); *National Bank vs. Insurance Co.,* 95 U. S. 673, 679 (24 L. Ed. 563); *Steel vs. Insurance Co.,* 2 C. C. A. 463, 51 Fed. 715, 723, and cases there cited; *Am. Ins.* (6th Ed). Sec. 295. If the policy will admit of two constructions, that one should be adopted which will indemnify the insured."
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> *Canton Ins. Office vs. Woodside,* 90 Fed. 301, p. 305.

In construing the contract of insurance, the intention of the parties at the time of entering into the same, the understanding of the parties and the purpose of the contract as shown by the whole contract will be considered and, if possible, be enforced by the court in interpreting such contract.

In arriving at the understanding of the parties and the purposes of this particular clause, it is important to consider the history of this F. P. A. warranty, which is stated in *Gow Marine Insurance,* 3rd ed., pp. 183-187. This clause, as originally worded, read as follows:

> "Warranted free from average, unless general, or the ship be stranded."

It was afterwards found necessary to permit the occurrence of other casualties besides "stranding" to open up the exception, and the clause was then worded "warranted free from average unless gen-

eral or the ship be stranded, sunk or burnt" or some such similar cause. Afterwards the words "in collision" were added, usually followed by words of limitation as to the extent of such collision or the object collided with. The warranty was first used about 1749 in the form as first above stated, and about the year 1860 the words "sunk or burnt" were added, and most marine policies issued in England containing this F. P. A. clause have used the words "sunk or burnt" since that date. It was evidently the original purpose of this clause to limit liability for partial loss to the damage caused by the particular exceptions enumerated in the F. P. A. warranty; but the construction has been gradually broadened, so that at the present time it is established that in case of the happening of one of the excepted events the insured is entitled to recover for any partial loss sustained by him, irrespective of the fact of whether the loss was caused by the excepted peril or otherwise. *London Insurance Co. vs. Companhia,* 167 U. S. 149.

The case of the *Glenlivet,* Prob. p. 164, decided by Judge Barnes in the admiralty division of the High Court of Justice, in 1893, and affirmed in 1894, Prob., p. 48, by the Court of Appeals, is the only reported case in England or in the United

States, construing the word "burnt" in this clause which we have been able to find. The fact that this is the only reported case construing the word "burnt" seems to us an important point in considering the proper construction and understanding of the parties as to the clause in question. As stated by Mr. Gow, the word "burnt" was added to this F. P. A. warranty in the year 1860, and from that time up to the time of the decision in the *Glenlivet* case in 1893, a period of thirty-three years during which the word "burnt" was used in practically all marine insurance policies, numerous cases must have arisen in which it was necessary for the underwriters to decide, in order to adjust such cases, whether or not the ship was "burnt" within the meaning of the policy. The fact that no case was ever taken to the courts for a decision upon this point would strongly indicate that there was a clear and general understanding between the insurers and the insured as to what facts would or would not constitute a "burnt ship" within the meaning of this policy. If such an understanding had been vague and indefinite and the amount of burning necessary to delete the F. P. A. warranty was more than appears in the present case but less than the burning of the whole ship, there could have been no such

common ground of understanding and agreement between the insured and the insurers as would prevent in some cases a contest or dispute as to the amount of burning necessary to delete the warranty. Necessarily, there must have been some common ground of understanding and agreement or some of the innumerable cases which must have been adjusted under this F. P. A. warranty would have reached the courts for determination. On the other hand, if there had been such a common understanding and agreement that any burning of the *ship itself*, that is, *the structural part of the ship as distinguished from its cargo,* dunnage or other materials aboard was sufficient, there would have been no occasion for any dispute as to the liability in any such case of partial loss, and the fact that there are no reported cases construing the word "burnt" except the case of the *Glenlivet,* or any case up to the present time construing the words "on fire" would seem to us to clearly show a distinct understanding between the insurers and the insured that any burning of the fabric or structure of the ship itself was conceded to be sufficient in the first instance to satisfy the exception of "burnt" prior to the decision in the *Glenlivet* case, and certainly to satisfy the exception of the words "on fire," which were inserted

immediately after the decision in the *Glenlivet* case. Mr. Gow, in his work on *Marine Insurance,* 3rd ed., p. 80, clearly sustains this contention.

> "In the case of burning another difficulty arises. If the property insured is a cargo of flour, and if this interest takes fire and is burnt without the ship being damaged by the fire, the exception has not been taken out of the memorandum, and the underwriter remains free of claim for partial loss or damage of the flour. It is the ship that must be burnt, say a beam scorched, a floor charred, a ceiling burnt. Consequently the destruction of a cabin by fire removes the exception while a fire in the cargo itself does not. Such was the view acted upon almost universally until lately, but a recent decision of Mr. Justice Barnes (the *Glenlivet,* 1893) has raised a new point."

After discussing this decision, Gow further says:

> "The judgment in the *Glenlivet* case has excited considerable attention, as it takes away on principle what was long granted without question. * * * Since the issue of the decision some slips have had the words 'on fire' added to 'burnt,' confessedly *in the hope and expectation of thus restoring to the assured what has been taken from him by the decision."* (Italics ours.)

Here we have a direct authority for our contention. Prior to the decision in the *Glenlivet* case there had been a common and universal understanding between the insurers and the insured that any

burning of the *fabric or structure of the ship itself was conceded by the underwriter, and so understood and agreed to by the insured, to be sufficient to open up and delete this F. P. A. warranty.* This is also direct authority for the contention which we make and which we think will not be disputed, that the words "on fire" were added to the F. P. A. warranty immediately after the decision in the *Glenlivet* case for the sole purpose and expectation, as stated by Mr. Gow, "of restoring to the assured what has been taken from him by the decision." In other words, that the decision in the *Glenlivet* case being contrary to common understanding and agreement of the insured and the insurer as to the extent of burning necessary to delete this warranty, the words "on fire" were added so that there would be no future question but that *any burning* of the *structure* or *fabric* of the ship as distinguished from the cargo, would delete this warranty, and allow the insured to recover for a partial loss; that is, re-establish the common understanding which had been in effect for over thirty years prior to this decision. In the present case the word "burnt," as stated above, is found in the body of the policy, which is the old form, while the rider to the policy contains the substituted words of "on fire" in place of

"burnt." It was the contention of the appellant in the court below, and we suppose will be its contention in this court, that there is no difference between the meaning of the two words, but as stated by Judge Neterer, the substitution of the words "on fire" in the rider clearly evidences the purpose in the minds of the parties to distinguish between the words "burnt" and "on fire." It is apparent to anyone that this change was not made without some purpose, and we think it clear that that purpose is as stated by Mr. Gow. Certainly, such was the intention of the parties, and the intention of the parties in entering into a contract would control if the contract as a whole can be reasonably construed so as to carry out such intention.

On this point we would particularly direct the court's attention to the testimony of Mr. A. M. Becket, a witness produced on behalf of libelant in the court below. Mr. Becket is an average adjuster, and has been engaged in that business since the year 1897 or for a period of over seventeen years. Prior to the year 1911 he was connected with average adjusting firms in Liverpool and London, England, and while connected with such firms he adjusted many cases where an F. P. A. warranty identical with the one attached to the policy of the

appellant herein was involved. On page 229 of the record Mr. Becket testified that under an F. P. A. warranty similar to the one in this suit "it is the practice of the adjusters in England to consider the warranty open, if some structural part of the vessel has been actually on fire"; that the opening of the warranty does not depend upon the extent of the fire but depends solely on the fact as to whether or not the structure of the ship has been on fire, and on page 230 Mr. Beckett testified that from his experience as a practical English adjuster that such a construction of this warranty had never been contested by the English underwriters and further that from his experience he would consider that the *burning of a door which was built into the bulkhead of the ship would be a burning of the structure of the ship sufficient to open up or delete the warranty in this case.*

There is no doubt but that the construction placed on this clause by the English underwriters, merchants and adjusters is the construction which this court should place upon the same, provided the wording of the clause would sustain such a construction. We understand this to be appellant's contention. Appellant, however, contends that the wording of the clause will not bear any such con-

struction. The testimony of Mr. Beckett as to the practice of English underwriters, merchants and adjusters is uncontradicted. If this testimony had not been correct it would have been a very simple thing for the appellant to have secured testimony to contradict the same. In the court below the respondent (appellant herein) relied solely upon the decision in the *Glenlivet* case to sustain its contention that there was no difference between the words "burnt" and "on fire." However, we do not think that the *Glenlivet* case, when the same is carefully considered, would sustain any such contention, nor do we think that this case holds that such a burning as is alleged and proven in the present case would not make the ship "on fire" or a "burnt" ship within the meaning of the F. P. A. clause. In the *Glenlivet* case no part of the fabric or structure of the ship itself was "burnt" or "on fire." The only thing "on fire" was the coal in her bunkers, the slight injury sustained by the ship herself being merely from the heat of the fire in her coal bunkers. The ship was an iron ship and did not or could not burn in any sense of the word. While the appellate court approves the lower court's conclusion of the facts, the appellate judges did not lay down any rule as to what facts would or would not constitute a burnt

ship, and Justice Smith expressly disapproved the rule laid down by Justice Barnes that "the ship is burned whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is *pro tempore* incapable of being properly used for the purpose of her voyage. That may be expressed by the term temporarily innavigable."

> "Then I come to the suggestion of my brother Barnes, which is that it must be a burning, such as to render the ship 'temporarily innavigable.' I do not think that this is right, because, supposing there was such a burning as only to stop the ship half an hour—suppose the ship was steered by rudder cords instead of by chains, suppose the rudder cords were burnt and the ship stopped for half an hour, would you call that a burnt ship? I should not, but that would come within my brother Barnes' definition of being 'temporarily innavigable' whilst the rudder cords were being adjusted. I cannot think that this direction is right.
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> "My own view is that you would have to tell the jury what I have already said about partial burning, and you would have to tell them that a partial burning may, under some circumstances, constitute a burnt ship, and may not under other circumstances, and having given that direction you would have to ask them, has the fire been such as to bring the ship to such a condition that you can consider her a burnt ship within the meaning of the English language."

Justice Davey approved Justice Smith's opinion, as follows:

> "I also agree that Gorrell Barnes, J.'s definition is open to criticism, but I think it is really a question to be answered by the jury, has the ship in the circumstances of this case been burnt."

We say, therefore, that the decision in the *Glenlivet* case was based entirely upon the particular facts of that case and is not an authority against our position in the present case.

The following statement by Judge Lindley on appeal, would seem to indicate the basis of the appellate court's decision:

> "Although it is extremely difficult to draw the line, yet in ninety-nine times out of a hundred you can see on which side of the line a case falls. If you ask anybody to draw the line between light and shade when they fade off from one to the other, he cannot do it, but one can often see plainly enough whether an object is in light or shade, and many cases may be practically dealt with in that way.
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> "I do not pretend to draw the line, but I can see as plainly as any juryman, or as any ordinary man can see, that this ship has not been burnt. That appears to me the true construction of this policy."

Judge Lindley could see that the facts in that case made it fall on one side of this indefinite line between "light and shade." And we think that the facts in the present case just as clearly make this

case fall on the other side under the clear and well understood meaning of the words used. We also think that it was the clear intention of the parties in this case by adding the rider with the words "on fire," to remove any doubt as to where the line should be drawn.

Construing the case of *Glenlivet,* Arnould (Section 891 on *Marine Insurance,* 7th ed.) says:

> "In the Glenlivet, a fire broke out on board the ship in one of the coal bunkers, severe enough to do some damage to the plating before it was extinguished. The shipowner contended that any fire doing any structural damage was sufficient to constitute a burning of the ship. The Court of Appeals, however, while agreeing that a partial burning might be sufficient, held that the question as to whether, under all the circumstances of the particular case, the vessel was, within the ordinary meaning of the English language, a 'burnt' ship, was one of fact and that *in this particular case* the vessel had not been burned." (Italics ours.)

In *London Insurance Co. vs. Companhia,* 167 U. S. 156, the court, in construing the words "in collision" in a similar clause, states:

> "It is impossible, as we think, to give a certain and definite definition to the words 'in collision' or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision within the meaning of the policy. The difficulty of

limitation or description is much the same as that pertaining to another expression in the same memorandum in regard to when a vessel is burnt. It is, however, obvious that a vessel would be said to have been in collision when the effect upon the vessel or the evidence of such a collision might be very much less than would be necessary to exist in a case of a fire, before one would describe a vessel as a burnt vessel."

The court considered the case of the *Glenlivet,* and after quoting extracts from the decision of Justice Smith in the appellate court, quote the following extracts from Justice Davey's decision:

"Counsel for the plaintiff says that the clause applies if a fire breaks out in any part of a ship although it has gone under before any great amount of damage is done to the ship. I cannot bring myself to think that any person would, either in the active use of language or in ordinary parlance, say that in such a case as that the ship has been burnt."

The learned judge also said:

"I think that it is really a question to be answered by a jury, has the ship in the circumstances of this case been burnt."

The Supreme Court then places the following interpretation upon the decision in the *Glenlivet* case:

"The English court took the view that as to a burnt vessel it must be such a burning as would constitute the vessel a burnt vessel within the ordinary meaning of the English language.

> The language is used in regard to the vessel as a whole, 'the company is to be free from average unless the ship be burnt.' That language would seem to indicate some essential burning of the vessel itself and not such a case as, put by one of the judges, of the burning of the cabin curtains. The case is referred to for the purpose of showing that the English court held the expression was defined according to the ordinary meaning of the English language. This leaves each case to be decided according to its own peculiar facts * * *
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> "And we agree with those judges that the words contained in the memorandum are intended to be used as Davey, Lord Justice, said, in accordance with the 'ordinary use of language,' or, as said by Lord Justice Smith, 'within the ordinary meaning of the English language.'"

In the case of the *London Insurance Company vs. Companhia,* above cited, the court held, following the interpretation which it placed upon the *Glenlivet* case, that the vessel had been in collision, although the vessel at the time was at anchor and was struck a slight blow, not damaging her to exceed $250.

Under the criterion as laid down by the Supreme Court of the United States in the above case, we think there can be no doubt but that the Sardanha was "on fire" within the meaning of the English language. The word "fire" as defined in

Webster's Dictionary, is "a state of ignition or combustion," and the words "on fire" are defined as "burning." Bouvier defines the words "on fire" as the "effect of combustion" (p. 663). There can be no doubt but that the bulkhead of the Sardanha was "on fire," nor can there be any doubt but that this was "in a state of ignition or combustion."

But if there remain any question as to whether or not the Sardanha was "on fire," we think that an opinion given by Mr. Walton, who was the solicitor for the underwriters in the *Glenlivet case,* and by Justice Barnes, who decided the *Glenlivet* case in the lower court, given before he went on the bench would finally dispel any such doubt. This opinion is found in a note on page 51 of *Owen's Marine Insurance, Notes and Clauses,* 3rd ed., referring to the word "burnt" in the F. P. A. clause. This opinion was given in 1886 prior to the decision in the Glenlivet case and, of course, prior to the substitution of the words "on fire" for the word "burnt". The note reads as follows:

> "The following was communicated by the Institute of London Underwriters to the members, December, 1886:
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> " 'Unless the ship be stranded, sunk or burnt.' Efforts have recently been made to show that the burning of ship's stores (such as

bunker coal) cancels the above warranty in a policy on ship.

"The company having been favored with a copy of the opinion of Mr. Walton, which is supported by Mr. J. G. Barnes, have pleasure in giving it publicity:

"In reply to your inquiry, the warranty clearly is not deleted by the fire in the bunker coal which you describe.

"If the expression had been 'on fire' instead of 'burnt,' there might have been some doubt, but even in that case we should have said that unless part of the fabric of the ship was on fire, in the sense of itself supporting combustion as distinguished from being scorched by the heat from some other burning material, the warranty would not be deleted."

Here we find the solicitor representing the underwriters in the *Glenlivet* case, and the judge deciding that case in favor of the underwriters, advising the underwriters seven years before that if the expression "on fire" instead of "burnt" had been used there might have been some doubt, if even a fire in a bunker coal did not delete the warranty, but that if a part of "the fabric of the ship was on fire, in the sense of itself supporting combustion as distinguished from being scorched by the heat from some other burning material," then the ship would be "burnt" or in any event "on fire."

We do not think that appellant will claim that the bulkhead, or door built into the bulkhead, are not parts of the fabric or structure of the ship. Nor do we think it will claim that the structure of the ship as distinguished from its cargo and dunnage, supported combustion. The door of this bulkhead, is in evidence in this case as an exhibit attached the deposition of G. H. Wylie (Record, p. 159) and has been sent to this court as an original exhibit for inspection. (Exhibit G. H. W. No. 2.) An examination of this door will show conclusively that it not only supported combustion but that it was very badly burnt. This opinion of the solicitor for the underwriters, in the *Glenlivet* case, completely negatives appellant's contention that the ship would have to be on fire *as a whole* in order to delete this warranty, and it also negatives its contention that the words "on fire" are to be given no different interpretation from the word "burnt." This opinion also clearly shows that the words "on fire" were substituted for the word "burnt" after the decision in the *Glenlivet* case, to restore to the insured what might be construed as having been taken from him by that decision, and that this was done upon the opinion of the underwriters' legal advisers, so that the previous understanding and agreement between

the insurers and insured of the burning of the fabric of the ship would open up this warranty, would be re-established by substituting the words "on fire." We think it perfectly clear, both from the decision and from the established practice and understanding of the English underwriters, merchants and adjusters, that the words "on fire" as contained in the F. P. A. warranty, are satisfied and this warranty deleted whenever any portion of the fabric or structure of the ship as distinguished from its cargo and dunnage is actually on fire or supports combustion, no matter how trivial the damage sustained by the ship.

II.

Was the Sardhana "On Fire" Within the Construction of the "F. P. A." Warranty.

If the Sardhana was "on fire" within the court's construction of the F. P. A. warranty, then appellee is entitled to recover its entire damage. The question here is solely a question of fact. Judge Hanford held, in deciding the appellant's (respondents below) exceptions to the libel, that the words "on fire" as used in the F. P. A. warranty "are indicative of a happening whereby the ship is endangered by actual fire burning some part of it and

necessitating extraordinary efforts to prevent serious damage. A bulkhead between decks is a part of a ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm and if not promptly subdued would certainly be destructive and such a happening would be truthfully described by saying that the ship was 'on fire.' "

(*Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 184 Fed. 947-949.) (Record, p. 322.)

Judge Neterer in the court below followed the practice of the English underwriters and average adjusters as testified to by Mr. Beckett, in construing this clause.

> "The testimony of Mr. Beckett, an average adjuster of London, England, shows that 'under clauses * * * containing the words 'on fire,' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire.' * * * The fire as shown by the evidence, was on some structural part of the ship, and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause."
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> (*Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 210 Fed., p. 960.) (Record, p. 328.)

In other words, both Judge Hanford and Judge Neterer squarely decided that the criterion as to whether or not the ship was "on fire" within the

meaning of this F. P. A. warranty was whether or not the fire was on some structural part of the ship—as distinguished from her cargo, etc.—and endangered the ship by actually burning some of its structural parts. The consequent damage is not material. We submit that this construction is not contrary to the decision in the *Glenlivet* case—in fact that it is in accordance with that decision in that it gives these words "on fire" a reasonable construction within the "ordinary meaning of the English language," and that it is strictly in accordance with the decision of the Supreme Court of the United States in *London Assurance vs. Companhia,* 167 U. S. at p. 158.

Following this construction of the F. P. A. warranty there can be no dispute in this case but that the Sardhana was "on fire" on November 18th, 1908. Appellant does not deny that the lazarette door which was built into and a part of the bulkhead was actually "on fire" and very badly burned. Having brought this door in as a part of the deposition of its witness George H. Wylie (Exhibit G. H. W. No. 2) and the door being before this court as an original exhibit, appellant is hardly in a position to deny that it was "on fire." It is quite evident, however, after reading the depositions

of appellant's witnesses, Alexander Wallace and George H. Wylie, that when appellant had this door introduced as an exhibit in connection with Wylie's testimony, that appellant had never seen the door, but had relied upon the statements of these witnesses to the effect that the door was *not burned,* but was merely scorched. An examination of the door will show that this is not true. Appellant, having been placed in this uncomfortable position by its reliance upon the statements of these witnesses, and having found from an examination of this door that it was badly burned, sought to prove that the fire damage was confined entirely to this door. Even if this were true, appellant could not escape liability, as this door was built into and a part of the bulkhead and was undoubtedly a structural part of the ship. (Beckett, Record, p. 230.) But the overwhelming weight of the testimony shows that not only this door but that a considerable portion of the bulkhead was burned, as well as a large amount of dunnage and ship's stores which were stowed immediately in front of this bulkhead.

The extended protest, a certified copy of which is a part of the record in this case as Libelant's Exhibit "L," contains the following statement with reference to this fire:

"November 18th * * * About 9:30 P. M. smoke was discovered issuing from the hatch by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter' and the S. S. 'Hornelen,' and the employees of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette, and saw the reflection of the fire over the top of the bulkhead between the after tween decks and the lazarette. The after tween decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after tween decks were burned and some of the ship's stores in the lazarette were damaged by water and chemicals.

"The origin of the fire was not discovered."

(Quoted in *Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 184 Fed. 947.) (Record, p. 321.)

This protest, the statements of fact contained in which it is admitted (Record, p. 120, pp. 149-150) were copied from the ship's log (apparently having been entered on the day of the fire), was signed and sworn to before a notary public on the 28th day of December, 1908, by the captain, first mate and three sailors from the bark Sardhana. In view of the statements in the depositions of the master and first mate, we wish particularly to call the court's at-

tention to the fact that this entry was made in the ship's log by the officers of the ship as a part of their records *immediately after the fire,* and that the protest was signed and sworn to by them before a notary public a little over a month after the fire occurred. While the ship's log is sometimes kept and the entries therein made by the first mate, still it is the master's duty to see that such entries are correct. He is required by law to sign the log, and the responsibility for any mistakes therein falls upon him. The ship Sardhana is a British ship, and the master is governed by the British laws and regulations as to keeping his log. The British Merchants' Shipping Act, 1894, 57 and 58 Vict. c. 60, provides:

> "239—(1) An official log shall be kept in every ship (except ships employed exclusively in trading between ports on the coasts of Scotland) in the appropriate form for that ship, approved by the Board of Trade.
>
> (4) An entry required by this Act in an official log book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence shall be made and dated so as to show the date of occurrence and of the entry respecting it; * *
>
> (5) Every entry in the official log book shall be signed by the master, and by the mate, or some other of the crew, * * *
>
> (6) Every entry made in an official log

book in manner provided by this Act shall be admissible in evidence.

"241—(3) If any person wilfully destroys or mutilates or renders illegible any entry in an official log book, or wilfully makes or procures to be made or assists in making a false or fraudulent entry in or omission from an official log book, he shall in respect of each offence be guilty of a misdemeanor."

Maclachlan's Law of Merchant Shipping, 5th Ed. p. 852.

This log book is the property of the ship, the record of the events of its voyage. It is kept by or under the direction of the master, in accordance with the provisions of the Act above quoted. For false entries therein, the master or the person making the same is subject to punishment as for misdemeanor. Libelant in this case had nothing whatever to do with the entries made in this log book. Is it unreasonable for libelant to *rely* upon the entries made in this log book by the master and the mate, freely and of their own accord, as a part of the records of their ship?

In answer to the tenth cross-interrogatory, Captain Wallace admitted that he testified in another suit which was pending in January, 1909, less than two months after the fire, that the entries in this protest were absolutely true. (Record p. 121.) The

court will readily see by comparing the testimony of these witnesses with the entry in the log book, which was copied into the extended protest, that same is directly contradictory. These witnesses either swore falsely, or, to put it mildly, were mistaken when they testified in this case two and one-half to three years after the fire, or else they made a fraudulent entry in their log book and thus committed a misdemeanor, and further, swore falsely before a notary public in signing the protest. To give the witnesses the benefit of any doubt, is it not more reasonable to suppose that under the circumstances, they made a correct entry in their log book *immediately after the fire* when the matter was fresh in their minds, and that they were mistaken when they testified in this case years after the fire? (17 *Cyc.* 781, and cases cited.) If the court does not come to this conclusion, then it must conclude that the testimony of these witnesses is absolutely unreliable and of no value whatever.

Appellant (respondent below) contended that both Wylie and Wallace had fully explained in their testimony the statements in the protest which were contradictory to their testimony.

Mr. Wylie stated, in answer to cross-interrogatories 1, 2, 3, 4, 5 and 6, that he signed this protest,

that the protest contained the entry of November 18th, which was copied from the log, and that the entries in the log and the statements in the protest were true. His explanation, however, comes in answer to cross-interrogatory 7, where he states:

> "I think I might explain one statement of that protest. It states there that the Captain saw the reflection of the flames over the top of the bulkhead. That is an impossibility. The bulkhead extended up to the upper deck. Where the Captain saw the reflection of the flames was through ventilation holes cut into the bulkhead. That is the only part of the statement *with which I can find fault.* The ventilation holes were a few inches from the top of the bulkhead. By the word 'burned' in that protest I mean 'scorched' or to a slight extent affected by fire."

That is the only explanation made by Mr. Wylie, and we submit that it is far from satisfactory. As this bulkhead was approximately 7 feet high (Record p. 203), it must have been quite an active fire if the master saw the reflection of the flames through the ventilation holes at the top of the bulkhead. This testimony of Mr. Wylie was taken in London, June 28, 1911.

When it came to taking the testimony of Captain Wallace on August 26, 1911, we find that respondent goes into the matter of this protest itself, and asks the Captain to explain the entries therein.

The Captain approaches his explanation with much more assurance than the mate, possibly due to the length of time which he had had to think it over. The Captain admits the signing of this protest which contained this entry of November 18th, that it was copied from the log, and that he swore to the same as being correct, and in answer to cross-interrogatory 4, states that he believes the entries were true, although he did not make them himself. His explanation in answer to interrogatory No. 19, is as follows:

> "The bulkhead itself was not burned; it was the door that was burned, or charred rather; if you are going to distinguish the door from the bulkhead, I consider that the door is the bulkhead, or part of the bulkhead; and if you are going to mention the door and the bulkhead I would say it was only the door that was burned. I was not responsible for the language of the extended protest or the entries in the mate's log. The fact is that only the door was scorched and slightly charred, in part, and I did not see and do not see any use in distinguishing between door and bulkhead, as I consider the door a part of the bulkhead."

This certainly bears out our contention that the door was a part of the bulkhead, and if so, then the ship was "on fire" beyond any doubt within the lower court's construction of this F. P. A. clause.

The court will see that the original entry in the log book was as follows:

> "It was then discovered that the aforesaid *bulkhead, together with the door thereof,* (the bulkhead was built in the vessel) * * * was burned."

Here the distinction between the door and the other portion of the bulkhead is clearly made, and the Captain's attempted explanation becomes absurd. We submit that the alleged explanation of these witnesses makes their testimony absolutely unworthy of any credit or belief.

Appellant contended in the court below that this protest was prepared under the direction of appellee. We cannot see that this affects the matter in any way, as it is admitted that the entries in the protest were copied from the ship's log, and there certainly can be no contention that the libelant had anything to do with the preparation of the ship's log. The consignee in the case of damage to cargo has a right to demand a protest from a shipmaster, or members of his crew, in making up his proof of loss.

> *Ginsburg's Legal Duties of Shipmasters,* 2nd Ed. p. 141.

Appellant knows, and this court knows that this protest was not prepared for use against appel-

lant in this case, but was prepared as a part of libelant's (appellee's) proof of loss required by appellant and other underwriters at the time of submitting its claim for damage to cargo. This protest being admittedly a copy of the ship's log, is certainly admissible as evidence in this case. It is expressly provided in the Merchants' Shipping Act of 1894 that the ship's log shall be admissible as evidence. It would be admissible in rebuttal of the master's and mate's testimony, if on no other ground, it being admitted by them that they signed this protest under oath.

American and English Ency. of Law, 2nd Ed. Vol. 19, p. 1077.

Two days after the fire occurred, Mr. Frank Walker, a marine surveyor, made a careful examination of the vessel and of the damage done by the fire, the written report of which survey is a part of the record in this case marked "Libelant's Exhibit K". Mr. Walker found upon his examination that the permanent wooden bulkhead which divides the after 'tween decks from the lazarette was badly burned and charred, together with the door to same. Also that considerable dunnage in the after part of the 'tween decks close to the said bulkhead was more or less burned, and that the paint work in the after

'tween decks and lazarette was damaged by fire and smoke. Also that a quantity of the ship's stores had been damaged by water and chemicals, and that at the time of his examination, two days after the fire, there were signs of considerable water having been played into the after 'tween decks.

Mr. Frank Walker made the only survey that was ever made of this fire damage—he testified that the fire extended from 20 to 25 feet athwartships, including the door, and that the burning over the entire area was approximately the same as the door. (Record pp. 202-3.)

Fred D. Beal, superintendent of the Pacific Creosoting Company at the time of this fire, testified that a considerable portion of the bulkhead was burned as well as the door (Deposition of F. D. Beal, Record pp. 66-7.) Roy E. Douglas testified to the same effect. (Record pp. 187-8.) Also Fred N. Beal. (Record p. 60.) Respondent's witness Tuttle testified that the bulkhead was burned the same as the door. (Record p. 256.) We wish to call the court's attention to the diagram or exhibit attached to the deposition of Fred D. Beal, and to his testimony with reference to same (Record p. 96) showing the point of origin of the fire and area burned. There was in fact, a material fire on said

bark, doing damage to the extent of $150.00 to $200.00 to the door and bulkhead of said ship and so materially weakened the structure thereof that in the opinion of an experienced marine surveyor it should have been renewed and repaired. (Record p. 206.)

There can be no serious dispute but that the ceiling was at least blistered and smoked, or that a considerable portion of the dunnage in the after 'tween decks immediately in front of the bulkhead was burned (Record pp. 272-313); deposition of F. D. Beal. (Record p. 67.) We also wish to call the court's attention to the fact that this dunnage and the sacking, etc., immediately in front of the bulkhead door in the vicinity of the fire were more or less saturated with creosote, which is inflammable (Record pp. 194, 206, 80, 135), and that the drums of creosote were only a very short distance away from the seat of the fire; had this fire obtained good headway there would have been a very serious conflagration, probably resulting in the loss of the ship. (Record pp. 198, 206.) Extraordinary efforts were necessary and they were used in extinguishing this fire in order to save the ship. Immediately on discovering the fire, the alarm was sounded, which was responded to by the crew of the ship "Jupiter" and

the S. S. "Hornelen", and by the employes of the Pacific Creosoting Company. The employes of the Pacific Creosoting Company obtained chemical fire extinguishers and took same aboard the bark, and they were used in extinguishing this fire. (Deposition of F. D. Beal, Record pp. 63-4-5, 67; Deposition of M. I. Helman, Record p. 51; Deposition of Fred N. Beal, Record pp. 59-60.) (Libelant's Exhibit "L".)

Up to the time that the fire extinguishers arrived, the crew and officers of the bark, about 12 men in all, were engaged in passing buckets of water down to the 'tween decks to the seat of the fire, about 40 or 50 buckets being used. (Deposition of F. D. Beal, Record pp. 64-5; Record p. 304.) After the arrival of the crews of the "Jupiter" and the "Hornellen" and employees of the Pacific Creosoting Company, there were from 20 to 24 men engaged in extinguishing this fire. (Record pp. 302-3; Deposition of M. I. Helman, Record p. 51; Deposition of F. D. Beal, Record p. 64.)

Despite all of these efforts, it took from 40 minutes to one hour to extinguish the fire from the time that it was first discovered. (Deposition of F. D. Beal, Record p. 64; Record p. 300, p. 134.)

There is no dispute in this case but that a fire alarm was sounded as soon as this fire was discovered by the watchman on the ship. No one knows how long this fire had been burning before it was discovered by the watchman (Record p. 300). The probabilities are that the fire had already gained considerable headway. The court will keep in mind the fact that this fire occurred in the after tween decks of the said ship, and that the first intimation to anyone that there was a fire was when the tween decks were full of smoke and it was coming out of the ventilators (Record p. 300; protest Ex. "L"). Appellee's witnesses testified, as stated above, that the employees of the Pacific Creosoting Company responded to the fire alarm, bringing with them a number of fire extinguishers, or that the crews of the ship Jupiter and the S. S. Hornelen responded to the fire alarm, and that in all there were twenty to twenty-four men on board the said ship engaged in extinguishing this fire. This is confirmed by respondent's own witness Yeaton (Record, pp. 500-1-2). Appellant claimed in the court below that although these men responded to the fire alarm, and that the employees of the Pacific Creosoting Company brought fire extinguishers with them, still that they did not assist in putting out the fire; the

testimony, however, shows conclusively that these men did assist in putting out the fire, and that the fire extinguishers were used for this purpose. (Deposition of F. D. Beal, Record pp 64, p. 87; deposition of Helman, Record p. 51; deposition Fred N. Beal, Record pp. 59-60; Libelant's Exhibit "L"; Yeaton, Record pp. 300-302.) We do not see how there can be any dispute but that the structural part of the ship was "on fire," and that the ship was in imminent danger of being consumed, and that extraordinary efforts were necessary and were made to extinguish this fire. In this connection we wish to again call the court's attention to the testimony of Mr. A. M. Beckett, at pp. 229-30. Mr. Beckett testified that he had adjusted many cases containing F. P. A. warranties such as the one contained in the policy in this case, and that in adjusting loss or damage to cargo where the F. P. A. warranty contained the words "on fire" it has always been the practice of adjusters in England to consider the warranty opened if some structural part of the vessel had been actually on fire, and that the test as to whether or not the warranty was deleted was whether the structure of the ship had been on fire, and that the extent of the fire and the damage caused thereby were immaterial, and that in his long ex-

perience such a construction of the F. P. A. warranty containing the words "on fire" had never been contested by the English marine insurance underwriters. Mr. Beckett explains the reason for the substitution of the words "on fire" for the word "burnt," which was in common use prior to the first decision in the *Glenlivet* case, decided in 1893, reported in 7 Aspinal Cases, p. 342, the reason being that the assured demanded better protection after the decision in said case and would not consent to the use of the word "burnt," and insisted upon the insertion of the words "on fire." Mr. Beckett also testified that under the practice of marine adjusters, which has not been contested to his knowledge by the English marine underwriters, he would consider that the burning of the door which was built in the bulkhead of the vessel would be a burning of the structural part of the vessel sufficient to open up the warranty (Record p. 230). This testimony becomes important in view of respondent's contention, which we do not dispute, that the construction of this policy is to be determined by English law and practice.

The only evidence introduced by appellant to contradict the testimony of Mr. Walker, Mr. Beal, Mr. Douglas and the other witnesses who testified

on behalf of libelant, is the testimony of Captain Baird, marine superintendent of the owners of the Sardhana; Captain Wallace and Mr. Wylie, master and first mate respectively of the Sardhana; Mr. Yeaton, an apprentice on the Sardhana, and a Mr. Preece, a stevedore. Respondent says that Baird, Wallace and Wylie are disinterested witnesses. Possibly they are disinterested, but they certainly are not unbiased. A possible explanation of their attitude in this case might be the fact that there was considerable unpleasantness between the ship and the Creosoting Company on account of payment of freight on damaged and lost cargo. Mr. Stevens, manager of the Creosoting Company, testified: "We protested against payment of freight, but the charter party was made out and the number of drums being delivered, that we were to pay on the number of drums delivered. We were compelled to pay the freight." (Record p. 170.)

Captain Baird was in Seattle at the time of the fire, and on the day after the fire Captain Wallace came over to Seattle and reported to him that there had been a fire on board the ship (Record p. 268). He went over to Eagle Harbor the next day, found that the fire had taken place at the outside of the lazarette door, and that the door was scorched and

the under side of the deck stained (Record p. 268). He took no notes and made no written report (Record p. 273), and testified in this case four years after the fire occurred entirely from memory. On pp. 272 and 273 of the record it appears that Captain Baird had a very confused idea as to the difference between a burn and a scorch.

Respondent relies strongly upon the testimony of Captain Wallace and First Mate Wylie of the Sardhana. The testimony of these witnesses was taken upon written interrogatories in August and June, 1911, respectively, which is a very unsatisfactory manner of securing testimony upon so important a point, as there is no way of properly cross examining the witnesses. We have shown, moreover, that no reliance can be placed on the testimony of these witnesses.

The other witnesses produced by appellant upon this point, Yeaton and Preece, testified solely from memory some four years and four months after the fire. Mr. Yeaton, on cross examination, testified as follows:

> "Q. Can you swear at this time that the bulkhead was not burned to any extent? Can you swear that at this time?
>
> A. Well, I would not like to swear that there was no damage done to the bulkhead.

Q. Would you swear that the ceiling was not smoked and blistered?

A. No, I would not swear that the ceiling was not smoked.

Q. Would you swear that it was not blistered from the flames and heat of the fire?

A. No, I wouldn't swear to that."
(Record, p. 306.)

This witness also testified that approximately forty buckets of water were passed below to put out the fire (Record p. 304). Witnesses Wallace and Wylie testified that there were only five buckets of water passed. Witness Yeaton also testified that there were twenty-four men on board passing water (Record pp. 302-3), and that the crews of the Jupiter and Hornelen and the employees of the Pacific Creosoting Company came on board and assisted in putting out the fire (Record pp. 303-4).

Mr. Preece testified that the door was charred, that the deck above was all blackened with smoke, and that the paintwork was all blistered (Record p. 286).

Respondent also introduced another witness, Tuttle, to prove the extent of the fire, but as the witness testified that a portion of the bulkhead was burned, no mention was made of his testimony in appellant's argument below (Record p. 256).

Before leaving this subject we wish to call the court's attention to Mr. Beckett's reference on cross examination to a fire aboard the steamship Watson, which was adjusted under this same F. P. A. warranty. The damage to the structure of the Watson was between $300 and $400—which was deemed sufficient to open this warranty (Record p. 240). In the adjustment of the Mechanicien loss by Mr. Beckett the damage was also trivial, but was considered sufficient under the English law and practice to delete this F. P. A. warranty (Record p. 243). Certainly under the *Glenlivet* case the underwriters would not have considered this vessel "burnt." This shows conclusively that the English underwriters and adjusters themselves place an entirely different construction upon the words "burnt" and the words "on fire."

We respectfully submit that the testimony of Mr. Frank Walker, a disinterested witness who made a careful examination and survey of this fire damage immediately after the fire, in the regular course of his business, corroborated as it is by the testimony of appellee's other witnesses, is entitled to more weight than the testimony of any of the witnesses produced by respondent in this case, and that the testimony herein shows conclusively that

the Sardhana was "on fire" within the meaning of this F. P. A. warranty. That is the sole question here. If the Sardhana was "on fire," then this warranty is immediately opened, irrespective of whether the damage or loss resulted from the fire or not.

26 *Cyc.* 682.
London Assurance Company vs. Campanhia, etc., 167 U. S. 149.

It is immaterial whether repairs were made or whether they were necessary. If the warranty has been deleted, libelant is entitled to recover its entire loss.

III.

Sue and Labor Expenses.

There is no dispute in this case as to the fact that the lighter alongside of the Sardhana, loaded with 272 drums of creosote, capsized on the night of November 21, 1908, as a result of which all of said drums were thrown into the bay. There is also no dispute but that the appellee was diligent in taking steps to save these drums and the creosote contained in same, and to thus minimize the loss. The parties have heretofore agreed that the "sue and labor" expenses incurred in saving these drums, as shown in the particular average adjustment, were

proper expenses, and that the same were paid by the appellee herein. The only contention which appellant makes in connection with the sue and labor expenses is that the barge which capsized on the night of November 21 was unseaworthy at the time the drums were loaded aboard it, and that, therefore, its policy of insurance never attached to the cargo aboard said lighter. In other words, that there is an implied warranty of seaworthiness as to lighters used in discharging cargo, and that this warranty, having been broken, the policy never attached, and that they are, therefore, not liable for these sue and labor expenses.

Appellant admitted in the court below that unless there was an implied warranty of seaworthiness as to this lighter, and unless this warranty was broken, they cannot escape liability for their proportion of the "sue and labor" expenses.

In our opinion, appellant is liable for its proportion of sue and labor expenses irrespective of its liability for its proportion of the loss and damage to the other cargo on the voyage from London to Eagle Harbor.

Under the F. P. A. clause above quoted, it is provided that "each craft or lighter to be deemed

a separate insurance." And further, that this policy covers "all risk of transshipment and of craft, lighterage and/or any other conveyance from the warehouse until on board the vessel and from the vessel until safely delivered into warehouse." And in the body of the policy it is provided: "Including the risk of craft and/or raft to and from the vessel." The barge or lighter which capsized on the night of November 21st was moored alongside the Sardhana during the day of November 21st, and 272 drums containing creosote were loaded onto the said lighter, the loading of the said drums having been completed about 5 o'clock p. m., at which time the longshoremen engaged in unloading the bark quit for the day. This lighter was left moored alongside as was customary so that her loading could be completed on the following day. During the night an unexpectedly heavy wind sprang up, causing the barge to capsize, throwing the 272 drums into the bay. (Survey Report, Libelant's Exhibit "J.") A survey was called for and, on the 23rd day of November, 1908, Mr. Frank Walker held a survey upon said lighter and recommended that bids for salving and recovering the drums from the bay be obtained and that the barge be towed to a safe place and put on the gridiron for examination. This was

subsequently done and the surveyor found that the barge was undamaged, was taking no water. Bids were subsequently called for and a contract let for the salving of the cargo. Certain expenses were incurred in connection therewith, amounting in all to $1,377.95 (Particular Average Adjustment, Libelant's Exhibit "M"; Libelant's Exhibit "G"; Stipulation, Record pp. 171-2; Libelant's Exhibit "H" and Record pp. 172-3), as a result of which 268 of said drums, together with their contents, of the approximate value of $3,200, were recovered. Four of said drums, together with their contents, of the approximate value of $63, were entirely lost. (Libelant's Exhibit "J.")

Under the clause above stated the insurance policy of the appellant undoubtedly covered this cargo which was loaded aboard the lighter, and, if no steps had been taken and expenses incurred by the appellee to recover the cargo, the appellant would have been liable for its proportion of the entire value of said cargo as a total loss. The clause that "each craft or lighter shall be deemed a separate insurance" means that a total loss of the cargo upon any particular lighter would entitle the assured to recover in full for said loss, although such cargo

amounted to only a small part of the entire shipment.

As was said by this court in the case of *St. Paul Fire & Marine Insurance Co. vs. Pacific Cold Storage Co.*, 157 Fed. 632:

> "It seems to us that under the clause of the policy that each craft or lighter was deemed a separate insurance, the correct view would be that a distinct liability was assumed when the goods were reloaded at St. Michaels."

In the above case, the goods were removed from the ocean steamer at St. Michaels to river steamers and barges for transportation up the Yukon river. In that case it was held that each of the river steamers and barges constituted a separate insurance so that the assured could recover for a total loss of any such steamer or barge, irrespective of the fact that the proportion of the cargo on such steamer or barge was only a small proportion of the entire shipment covered by the policy.

Any sums paid out or expenses incurred for the purpose of averting or minimizing a loss, which if such expenses had not been incurred, would have fallen upon the underwriters, are regarded in the nature of expenses of salvage, and are brought within the meaning of the "sue and labor" clauses of

marine policies. The test of a "sue and labor" expense is that it was incurred to avert a loss, or probable loss, which the underwriters would have been compelled to pay.

St. Paul Fire & Marine, etc., vs. Pacific Cold Storage, supra.

Arnold on Marine Insurance, 7th ed., Sec. 870.

Appellant's contention that this barge was unseaworthy is an affirmative allegation, and appellant is required to prove it by preponderance of the evidence.

Nome Beach, etc. vs. Munich Assurance Co., 126 Fed. 827.

This burden the appellant has not met. On the other hand, the testimony in this case shows conclusively that the lighter was seaworthy at the time it was put into use.

No one saw the lighter capsize, as this happened some time during the night. The testimony is uncontradicted that there was a heavy gale during this night. Mr. F. D. Beal says that there was a southeast gale (Record, pp. 69-70). This scow was examined and sounded for water on the night of the capsizing, *after she had been fully loaded,* and was found to be all right at that time (Record p. 70

of F. D. Beal). This lighter was carefully surveyed by a marine surveyor while in the water, and afterwards, when it had been removed from the water and placed on a gridiron (Libelant's Exhibit "J.") She was not leaking at that time and no repairs were ordered or made to the lighter before she was again placed in commission (Record p. 193, p. 213). In the face of this testimony, we fail to see how respondent can contend that the lighter was unseaworthy. These witnesses did not deny the heavy weather on this night; some of them admitted it and the balance of them did not remember whether the weather was bad or not. Their testimony as to the unseaworthiness of the lighter is all supposition based upon no facts whatever. Is this testimony entitled to any weight as against the testimony of a marine surveyor who carefully examined the lighter in the ordinary and regular course of his business, for the express purpose of ascertaining whether she was seaworthy or not, and who again placed her in commission without ordering any repairs whatever?

It is possible that this lighter did sink or capsize because of water in it, but if this is true, the water did not leak in through open seams as contended by appellant, but on account of the unusually heavy sea, the waves washed over the lighter and

the water went through her hatches into the hold (deposition of F. D. Beal, Record p. 94).

But even if appellant had met this burden and had established by a preponderance of the evidence that this lighter was unseaworthy, still we think that this defense would not aid them in the present case.

The appellant contended throughout the trial of this case in the court below that this policy was to be governed by English law and practice, the contract of insurance having been made and entered into in the City of London, Kingdom of Great Britain, "and was and is governed by the law of that kingdom." (Appellant's answer, paragraph VIII). This contention of appellant's is not disputed by the appellee in this case. Under the English law, the warranty of seaworthiness which is implied at the time of making and entering into a contract as to a ship does not extend to lighters which are employed to land cargo from the ship, where the insurance covers risks of craft from the vessel until safely landed in the warehouse.

Arnold on Marine Insurance, 7th ed., Sec. 689.
19 *Am. & Eng. Ency. of Law,* 2nd Ed., p. 1002.

Lane vs. Nixon, L. R. 1, C. P. 412.

"Where the insurance is on goods 'until safely landed' and the mode of landing is by

lighters, there is no warranty that the lighters will be seaworthy for that purpose."

26 *Cyc.* 645.

The reason for this rule is set out by Justice Keating in the case of *Lane vs. Nixon, supra:*

"The implied warrant of seaworthiness is here sought to be extended far beyond anything to which it has ever yet been extended. Hitherto it has been always considered to apply to the state of the vessel at the commencement of the voyage * * *. But here, the employment of lighters to land the goods seems to be a usual and ordinary incident of such a voyage, and has no reference whatever to the implied warranty of seaworthiness. I think it would be a dangerous step to extend that warranty in the manner contended for by the defendant's counsel."

Montague Smith, J., in the same case, stated:

"The implied warranty of seaworthiness is one which the law has engrafted upon the express contract of insurance. I think we are not warranted in extending it further than it has already been carried, which we clearly should be doing if we decided in favor of the underwriter in this case. The contention on the part of the defendant has been that the voyage consists of various stages, and that the warranty of seaworthiness applies to each of them. If the landing of the goods by means of lighters could have been said to form one of several stages of the voyage, possibly the principle contended for might have been extended to it. But I do not think it can in any sense be said to be a stage of the voyage. It is rather an accessory

> or incident of the voyage. Not only is it implied that the obligation of landing the goods is to fall upon the shipowner, but the owner of the goods has in distinct and express terms insured himself against risk *to and from the ship.* This particular risk was distinctly contemplated and in terms provided against. The goods were lost through a peril of the sea in being conveyed from the ship to the shore in the ordinary and accustomed manner. There is nothing to justify the extension of the implied warranty of seaworthiness to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done. The landing of goods in boats or lighters frequently takes place on dangerous coasts; and, if the master had to inquire in all cases into their sufficiency or seaworthiness, much delay and risk must necessarily arise. It would be making the right of the assured to recover depend upon the merest accident at a distant port. For these reasons, I am of the opinion that the implied warranty of seaworthiness does not attach upon lighters employed to land the cargo at the port of discharge, and consequently that the sixth plea is a bad one."

If the appellant in this case had been the owner of these lighters and had furnished them in unloading this vessel, there might possibly have been some ground for their contention, but even in such a case we do not think that there would be any implied warranty of seaworthiness. The facts in this case, however, show that the appellant did not own the lighters and did not furnish them to the stevedores, and had nothing to do with the loading of the

lighters. (Deposition F. D. Beal, Record p. 69.) The lighters were furnished by the Washington Stevedoring Company, who were discharging, under the master's supervision, the Sardhana (Assn. Cross-Int. 21, Dep. A. Wallace, Record p. 123). Respondent's witness Preece was head stevedore of the Washington Stevedoring Company (Record p. 278, p. 257), and respondent's witness Tuttle was a donkey-man for the same company (Record p. 247). It was the common practice to unload such cargo at Eagle Harbor by lighters (Record p. 257).

Counsel for the appellant in his argument in the court below contended that the case of *Lane vs. Nixon*, cited above, was not the law of England today. Counsel cited two cases:

The Galileo, XVIII Commercial Cases, part 3, p. 146, advance sheets,

and

The Vortigern, 8 Aspinall, M. C. 523,

which he claimed overruled the doctrine laid down in the *Nixon* case. We have not been able to get a copy of the decision in the *Galileo* case, but from counsel's statement below we understand that that was a case of transshipment under a contract of affreightment. If that is correct, then that case is easily distinguished from the *Nixon case,* which was a case of *delivery of cargo* which was covered by

a contract of marine insurance. Appellant contended below that the warranty of seaworthiness was the same in both cases, that is, under a contract of affreightment and under a contract of marine insurance. It was in support of this contention that it cited the case of *The Vortigern.* The latter case merely holds that the implied warranty of seaworthiness which attaches at the commencement of a voyage is the same in both cases.

> "There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage."
>
> *The Vortigern, supra,* p. 527.

The doctrine of that case is undoubtedly correct. The implied warranty of seaworthiness in a contract of marine insurance upon a vessel is a condition precedent to the attaching of a policy. If this condition is broken, the policy never attaches. In a contract of affreightment the seaworthiness of the carrying vessel is implied in the contract between the carrier and the shipper, the breach of which warranty makes the carrier liable for any loss occasioned thereby. There is this difference, however,

between a contract of marine insurance and a contract of affreightment: In a contract of marine insurance there is no implied warranty that the vessel shall remain seaworthy during the entire voyage. Seaworthiness at the commencement of the voyage satisfies the implied warranty and, the policy having once attached, subsequent unseaworthiness will not avoid it.

Arnold on Marine Insurance, 7th ed., Sec. 691.

In a contract of affreightment, however, seaworthiness at the commencement of the voyage is not all that is implied. The owner of the vessel must, if it is possible to do so, keep the vessel seaworthy during the entire voyage. The difference is clearly stated in

McLachlan's Law of Merchants Shipping, 5th ed., p. 467:

> "There is that peculiar to this condition in a policy that if satisfied at the commencement of the risk the contract in respect of seaworthiness on the part of the assured is performed (except as regards voyages in stages requiring different or further equipment). But in the contract of the shipowner as carrier is implied this stipulation that should the vessel become unseaworthy in the course of the voyage he must make her seaworthy if there be opportunity, or he must not proceed further."

The case of *Lane vs. Nixon* clearly holds that the unloading by lighters is an incident to or acces-

sory of the voyage and not a new or separate stage of the voyage, and that, therefore, the vessel being seaworthy at the commencement of the voyage, there is no liability warranting that the lighters used in this incident of the voyage will be seaworthy.

In the case at bar it is admitted that the Sardhana was seaworthy at the commencement of the voyage. Therefore, the warranty of seaworthiness implied in the contract of insurance has been complied with and there was no implied warranty that the lighters used in unloading her at her port of destination would be seaworthy.

The relation between shipper and carrier under a contract of affreightment is entirely different from the relation between the insurer and the insured in a contract of marine insurance. The bill of lading usually constitutes a contract between the shipper and the carrier. In the absence of any express contract, however, the carrier agrees to carry the goods of the shipper and safely deliver the same to destination. For the purpose of this carriage and delivery the carrier warrants, not only that the vessel itself is seaworthy, but that all tackle, equipment, etc., necessary to carry and deliver the cargo are in a proper and seaworthy condition for such service, and failure to furnish such equipment would be such

negligence on the part of the carrier as would make it liable for all loss occasioned thereby. It is probably under this principle that the *Galileo* case was decided. As in all cases of transshipment of cargo, the carrier warrants that the agencies of the ship used in such service are proper, transshipment being the act of transferring the goods from one vessel, in which they have been carried, to another vessel, for the completion of another stage of the voyage.

Gow on Marine Insurance, p. 187.

Where such transshipment is made by the use of lighters or scows, the carrier warrants that such lighters or scows, being an agency of the ship, are seaworthy, and the furnishing of unseaworthy lighter would be such negligence on the part of the carrier as would make it liable for loss occasioned thereby.

In the case of carrier and shipper the goods are entirely under the control of the carrier, after they are laden aboard the vessel, and the carrier is held to a strict liability in carrying and delivering the goods. In the case of insurer and insured, neither of the parties has any control of the goods after they are laden aboard the ship, and, if the ship is seaworthy at the commencement of the voyage, the law places no further burden upon the insured as

the agencies of the ship in carrying and delivering the cargo are not in any way under his control, any more than they are under the control of the insurer.

If the case at bar was that of a loss by transshipment, the *Galileo* case might possibly have some bearing, as transshipment is sometimes held to be a new stage of the voyage, and an implied warranty of seaworthiness under the doctrine of a voyage in stages would probably apply to the new stage. But in the case at bar, the lighters were used as an accessory to, or incident of, the voyage.

The case of *Lane vs. Nixon, supra,* is clearly distinguished from the case of *The Galileo,* as we understand the facts and decision of *The Galileo* case, and we submit that the *Nixon* case is controlling in the case at bar. This case has been the law of England for over fifty years. It is cited with approval in

Arnold on Marine Insurance,
Cyc,
Am. & Eng. Ency. of Law.

We have been unable to find any case, either English or American, contrary to the *Nixon* case, and we are satisfied that this case is the law of England today.

Extent and Cause of Loss and Damage.

This shipment of iron drums containing creosote oil was loaded upon the British bark "Sardhana" at London, England, in the month of May, 1908, the loading of the same having been completed on the 29th day of May, 1908, upon which date the said bark by its proper agents issued its shipping receipt acknowledging receipt of 2,753 drums of creosote oil in good order and condition, from Blagden, Waugh & Company, which shipping receipt was endorsed in blank and forwarded to the libelant herein (Libelant's Exhibit "B"). Subsequently, Messrs. Blagden, Waugh & Company of London, England, as shippers, made out a consular invoice of said shipment, as required by law, which invoice shows the number of drums shipped, the number of gallons of creosote shipped in said drums, and shows in detail the cost of said shipment, including freight, insurance, etc., the aggregate of said detailed items being the cost of said shipment at port of destination. This consular invoice, a certified copy of which is part of the record in this case as Libelant's Exhibit "C", was made out before the American Consul in London, England, signed by the shipper, and sworn to by him as being correct,

and the original invoice was then forwarded to the United States Custom House at the nearest port of entry of said shipment into the United States, and it was upon this consular invoice that the duty was charged upon the different items of said shipment and paid by the libelant herein (Record pp. 147, 168). The shipping receipt (Libelant's Exhibit "B"), and the consular invoice (Libelant's Exhibit "C"), show that 2,753 drums of creosote, containing 251,134 imperial gallons of creosote, were loaded upon and received by the British bark "Sardhana" in good order and condition at the port of London, England, for shipment to Eagle Harbor, Washington.

After a tempestuous and rough voyage lasting approximately five and one-half months, the British bark "Sardhana" arrived at Eagle Harbor, Washington, with her cargo badly damaged, with the drums in a leaky condition, and a portion of the cargo loose in the hold of the ship. Mr. Frank Walker, a marine surveyor, at the request of libelant, on the 17th day of November, 1908, inspected and surveyed the cargo aboard the said bark previous to its removal from said vessel, and inspected and surveyed the said cargo on various dates as it was being discharged from said vessel, for the pur-

pose of ascertaining the amount of damage, if any, sustained by the cargo during the voyage. From the said inspection, examination and survey, Mr. Walker found that 2,012 drums were full and in good order, that 741 drums were damaged, of which number 716 drums were partly empty and 25 drums were entirely empty, and that the damaged drums were entirely unfit for further use and had no salable value (Libelant's Exhibit "I"; Record p. 190). As the drums were discharged from the vessel the good drums were placed in one pile, and the damaged drums were placed in another and separate pile. These damaged drums were carefully counted and examined by Mr. Frank Walker personally, and the figures in his survey report of 741 damaged and unmerchantable drums were compiled from his actual examination and count (Record p. 190). Mr. Barnaby, agent of Blagden, Waugh & Company, shippers of this shipment of creosote, attended at the time this creosote was being unloaded, as such agent, to see the condition of the drums and creosote. While Mr. Barnaby did not make as careful an examination and inspection of these drums as Mr. Walker made, and did not actually count the number of damaged drums, his estimate from his observation and examination

at that time was that about 700 drums were damaged, to such an extent that they were unmerchantable and of no value (Record pp. 224, 227). Mr. F. D. Beal, who was superintendent of the Creosoting Company in November, 1908, but who at the time of testifying was the manager of another creosoting company in Portland, Oregon, had an examination and inspection made of the damaged drums at the time they were discharged, and upon completion of the discharge of the cargo, sent a statement of the number of damaged drums to the office of the Pacific Creosoting Company in Seattle, Washington, which statement is in evidence in this case at appellant's request as respondent's Exhibit "I" (Deposition of F. D. Beal, Record p. 74). This statement was signed by Mr. F. D. Beal, and Mr. Beal swears positively that this statement was made from the original records taken at the time and correctly shows the number of drums damaged (Deposition of F. D. Beal, Record pp. 71-72). This statement corresponds with the number of damaged drums shown by Mr. Frank Walker in his survey report (Libelant's Exhibit "I"). Mr. E. D. Rood, assistant manager of the Pacific Creosoting Company in November, 1908, inspected the cargo at different times while it was being discharged and testi-

fied from his recollection, his testimony having been taken approximately two and one-half years after discharge of this vessel and long after he had severed his connection with the Creosoting Company, that between 750 and 800 drums were damaged, dented on the ends, the chimes being badly bent, some of them had holes in their sides, that they were all leaky, and that a number of them were empty (Deposition of E. D. Rood, Record p. 133). There is no evidence in this case to the contrary.

The contents of these damaged drums were emptied into the tank of the Pacific Creosoting Company and the amount of creosote obtained from them was carefully measured, these measurements being made under the supervision of Mr. Walker and Mr. F. D. Beal, superintendent of the Creosoting Company. When the contents of all the damaged drums and the three or four thousand gallons taken from the hold of the ship had all been dumped into the tank and measured, the total amount so obtained from said drums was deducted from the amount originally shipped in said drums, or the amount in the drums when they were delivered to the "Sardhana" in London, as shown by consular invoice (Libelant's Exhibit "C"), and it was found that 56,267.2 gallons had been lost during said voy-

age, or that the libelant was short this amount upon the outturn of this cargo. Mr. Walker checked these measurements and was absolutely satisfied that they were correct before making his report of survey (Record p. 191).

Mr. F. D. Beal made up a statement of the contents received from the 741 damaged drums discharged from the "Sardhana" and furnished the same to Mr. Walker, a copy of said statement having been furnished to the Pacific Creosoting Company's office in Seattle (Record pp. 71, 72, 74). This copy is in evidence in this case at appellant's request as respondent's Exhibit "2". Mr. F. D. Beal at the time of giving his testimony in this case, approximately four years after this statement was made up, was then unable to testify positively that the respondent's Exhibit "2" was a copy of the statement furnished by him to Mr. Walker, but from some of the records of the Pacific Creosoting Company which were in his possession at the time he testified, he testified positively that the outturn of 171 drums, being the first item shown on said exhibit, being 8,458 gallons, was a correct statement of the contents received from said 171 drums (Deposition of F. D. Beal, Record p. 74). This testimony of Mr. Beal, taken in connection with the testimony

of Mr. Walker, positively identifies this exhibit as a copy of the statement testified to by Mr. Beal, especially in view of the fact that the figures of the outturn of this cargo shown in surveyor's report signed by Mr. Walker (Libelant's Exhibit "I"), are identically the same.

Mr. E. D. Rood testified that his best recollection at the time of giving his testimony, not having any records before him at the time, was that between fifty and sixty thousand gallons of creosote were short in this shipment (Deposition of E. D. Rood, Record pp. 134, 137). Mr. Barnaby, who attended the discharge of this shipment as agent of the shippers, testified that when he examined the damaged drums, they were pretty well empty, and very little creosote in them. That he opened the bungs of many of the drums and found a good many of them were only one-third full and some of them were one-half full, but that none of them were more than one-half full (Record pp. 224-5).

Appellee has thus proven that 2,753 drums containing 251,134 imperial gallons of creosote were loaded on the bark "Sardhana" in good order and condition by Blagden, Waugh & Company (bills of lading or shipping receipts Libelant's Exhibit

"B", consular invoice Libelant's Exhibit "C"). The consular invoice (Libelant's Exhibit "C") certified as being a copy of the original consular invoice by the collector of the United States customs, signed and certified by the shipper and certified by the Collector of Customs of the United Kingdom at London, England, is proof of the cargo shipped both the number of drums and the gallons of creosote.

1 *Cyc.* 884 Sud-div. "A".

Arnould on Marine Insurance (7th Ed.), Sec. 1279.

Johnson vs. Ward, 6 E. S. p. 47.

Appellee has also proven by the direct and positive testimony above referred to that 741 of these iron drums were damaged and worthless on delivery and that 56,267.2 gallons of creosote were missing or short on delivery of this cargo at destination.

Appellant's contention below was that there was no shortage of cargo on delivery—as to the damage to 741, there seems to be no serious dispute.

This phase of the case presents a question of fact to be decided by the court from the preponderance of testimony and credit to be given to the testimony of the different witnesses. The court

below held that appellee had established the entire loss claimed by it.

> "The ship 'Sardhana' being seaworthy when she left London, the cargo in good order and condition when received by the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libelant is entitled to recover his damage. *The Peter der Grosse* L. R. 1 P. D. 414; *Nome Beach etc. vs. Munich Assurance Co.* (C. C.), 123 Fed. 827."
>
> *Pacific Creosoting Co. vs. Thames & Mersey Marine Ins. Co.,* 210 Fed. p. 961.

We do not, of course, claim that this finding of the lower court is in any way controlling upon this court, but it is undoubtedly the rule that this court will not reverse a finding of fact made by the lower court upon conflicting testimony unless it is clearly against the weight of the evidence. Where the testimony is taken in open court this rule is particularly applicable—where it is taken before a commissioner, or by depositions, as in this case the rule is not as applicable. Just how much credit will be given to the lower court's findings upon disputed facts depends somewhat upon whether or not an appeal in admiralty is treated as a trial *"de novo"* or a review. Benedict holds that such appeals are in the nature of a review. That no decree is entered in

the Circuit Court of Appeals—the final judgment being in the District Court.

Benedict's Admiralty (4th Ed.), Sec. 566.

This was the view of Judge Dietrich sitting with this court in the recent case of *Pacific Mail S. S. Co. vs. Schmidt,* 214 Fed. 513. If this court acts as a court of review on appeals in admiralty, it will not, of course, reverse the lower court's findings unless they are clearly erroneous. But whether or not appeals in admiralty are treated as trial *"de novo"* or as a "review" the rule is as stated in 1 *Ruling Case Law,* Sec. 42, p. 436.

> "The conclusions of the District Court on questions of fact will not be reversed unless the appellate court can satisfy itself that it has reached new conclusions which are better supported by the evidence." (Citing *Steam Dredge No. 1,* 134 Fed. 161.)

There is certainly ample evidence in this case to support the lower court's finding. In fact appellant introduced no positive evidence as to the loss of creosote, but relies solely upon the negative testimony of Captain Alexander Wallace, Mate Wylie and Apprentice Yeaton of the "Sardhana", who testified that there was no leakage of the ship, and that the ship took no water during the entire voyage. We have shown in connection with Cap-

tain Wallace and Mate Wylie's testimony as to the extent of the fire on the "Sardhana", that their testimony is absolutely unreliable.

It is admitted that the "Sardhana" encountered very rough and tempestuous weather on the voyage, that the cargo worked and broke loose, and that she shipped considerable water aboard, while these witnesses state that during the entire voyage of six months she took no water. Witnesses Wylie and Yeaton testified that the pumps were not used once during the entire voyage.

Witness Wallace testified that, in the "Jupiter" case, heretofore referred to, which was pending in January, 1909, and is reported in 181 Fed. 856, he gave the following testimony:

> "Q. You say much water was shipped on deck?
>
> A. Yes. She took in a lot of water at times.
>
> Q. The fact is that the weather you experienced in rounding the Horn on this voyage, was exceptionally severe weather, was it not?
>
> A. Yes. It was the worst weather I have had coming around.
>
> Q. And continued for an exceptionally long time?
>
> A. Yes." (Record p. 121.)

For further evidence on this point we refer the court to the extended protest (Libelant's Exhibit "L"), which shows that on numerous dates the vessel shipped large quantities of water. It is inconceivable that on a voyage of this length, and in view of the weather encountered, and the admitted fact that the ship took considerable water, that the pumps were not used once during the entire voyage. The entry, "Pumps, lights and lookout carefully attended to," appears in the log-book of the "Sardhana" practically every day during the rough weather experienced by her. Mr. Yeaton claimed that this entry meant that the carpenter merely turned over the pumps and oiled them. He admits, however, that it was customary on this ship to only turn the pumps over and oil them once a week, and it is a significant fact that this entry appears during rough weather practically every day. (Record p. 311.)

First Mate Wylie testified that upon the arrival of the ship at destination there was approximately one foot of creosote in the hold of the vessel. It is shown by the testimony of Mr. Walker and Mr. E. D. Beal that not more than 4,200 gallons of creosote were pumped out of the hold of the ship after her arrival. We have no way of figuring just how many gallons one foot of creosote in the

hold of the vessel would be. It certainly would not be anything approximating 56,267.2 gallons, the amount of lost creosote. 56,267.2 gallons is more than one-fifth of the entire cargo. The ship was fully loaded when she left London. Certainly approximately one-fifth of her cargo loose in the hold of the ship would be more than one foot in depth. Where did the balance of the creosote go?

"Q. Have you any knowledge as to how that loss (56,267.2 gallons) occurred?

A. Well, I know that the creosote was not there. That the drums were leaky, and in my investigation I understood it was pumped overboard at sea.

Q. Would that be an ordinary precaution, if there was any great amount of creosote in the hold in rough weather?

A. Any great amount loose liquid in the hold of a ship in rough weather would be a damage to the vessel."

(Testimony of Frank Walker, pp. 191-2 of the Record.)

CROSS-EXAMINATION.

"Q. What became of the 56,000 gallons that were missing?

A. I don't know. All I can tell you is what the crew told me, that it was pumped overboard.

Q. What member of the crew told you it was pumped overboard?

A. I think several of them. The captain did not, but the mates did.

Q. The mates. That is the only way that it could be accounted for?

A. That is the only way; it was not in the bark.

Q. Could not get out of the ship. Do you know how much was finally pumped out of all the limbers?

A. Three or four thousand gallons."

(Testimony same witness, Record p. 217.)

The ship "Jupiter" made practically the same voyage as the "Sardhana". The two vessels arrived at Eagle Harbor at about the same time and were unloading at Eagle Hrbor at the sme time. (Deposition of Wallace, answer to 34th interrogatory, Record p. 119.) The "Jupiter" carried the same cargo as the "Sardhana", creosote in iron drums shipped by Blagden, Waugh & Company, shippers of the "Sardhana's " cargo, and arrived at Eagle Harbor with a shortage of 51,321 imperial gallons of creosote, and 1,220 damaged drums.

Knohr & Burchard vs. Pacific Creosoting Company, 181 Fed. 856.

In this case the court found:

"In the vicinity of Cape Horn, the ship encountered bad weather, and in a heavy gale she was thrown on her beam ends, and part of

the cargo between decks was dislodged, and a number of the drums were so damaged as to spill the oil, and others lost their contents by plugs working loose. Most of the spillage was pumped out of the ship and wasted, so that, when the cargo was discharged at Eagle Harbor, there was a shortage of 51,321 imperial gallons, worth $2,800.00, and 1,220 drums were damaged, and 272 drums were completely ruined."

In the *"Jupiter"* case the claim for damages, damage to and shortage of cargo, was made against the ship, on account of bad stowage, freight being withheld, but on account of the wording of the charter-party in this case consignee *was compelled* to pay freight on the number of drums delivered, irrespective of their condition or contents (Record p. 170). Furthermore, there is no claim of bad stowage in this case, the damage being caused by perils of the sea.

In view of the antagonistic attitude of the master and mate of the "Sardhana", probably due to the dispute between libelant and the ship as to the payment of freight on damaged and lost cargo, it was impossible for us to prove directly that any creosote was pumped overboard during the voyage. (The master and mate would hardly admit such a fact to the consignee of the cargo when they were attempting to collect freight on the said cargo.)

But we submit that this is the only reasonable explanation as to the loss of his cargo. It is unbelievable that on a voyage of this length, and in view of the weather encountered, that the pumps were not used once. Libelant having proven that this cargo was loaded aboard the "Sardhana" in good condition, that the ship encountered extremely rough weather during which the cargo broke loose and worked, and arrived in a damaged condition and with a big loss, the damage to drums being external, we submit that the burden was upon the appellant to prove that there was no such loss. This appellant has not done.

On the question of damage to drums, the only testimony introduced by respondent is that of First Mate Wylie. In answer to the 31st interrogatory he stated:

> "As to the damaged drums there was a United States custom house officer on board tallying the drums for the customs dues; I tallied the drums for the ship and a tally clerk for the Pacific Creosoting Company," etc. (Record pp. 147-8).

If this witness tallied the drums and his tally was less than that of appellee, why was he unable to produce his tally or to testify positively as to the number of damaged drums? The records of the

custom house were open to appellant, and appellee paid duty on drums according to the custom house tally. If this tally varied from appellee's, why did not appellant produce the custom house tally? The positive testimony of appellee's witnesses, substantiated by written surveys and reports *made at the time,* showing the amount of loss and damage to cargo, is entitled to more weight than the negative testimony of appellant's witnesses. These witnesses admit that the cargo was damaged, and that a large portion of it leaked out of the drums into the hold of the ship. Still they claim that there was no loss. We submit that this testimony amply proves the loss and damage claimed by appellee, and that the decree of the District Court should be affirmed with costs.

We do not understand that there is any dispute in this case as to the correctness of the particular average adjustment, provided, the loss and damage to cargo is proven to be as shown in said adjustment. The adjustment is based upon the value as shown in the consular invoice (Libelant's Exhibit "C"), which is the amount paid by libelant for this cargo (Record pp. 4, 5, 6, 7), as shown by vouchers (Libelant's Exhibits "D", "E", "E^1", "E^2", "E^3" and "F"). The value of the cargo is made up by taking

cost at works of shipper, plus cost of filling drums, loading same aboard ship, freight, insurance, etc. We think that appellant will raise no objection to this valuation.

Appellant contended in its argument below that it was not shown by the evidence how much damage and loss was occasioned by the perils insured against, and will probably make the same contention in this court under Assignment of Error 13.

Appellee proved that this cargo was delivered on board the "Sardhana" in good order and condition, that the ship encountered tempestuous weather during which the cargo broke loose and worked, and that the cargo was delivered in a damaged condition, such damage to drums being external, and that a large amount of creosote was short upon delivery. This, we submit, is all that the insured is required to prove. The burden is upon the insurance company of proving otherwise or that the loss or damage comes within the exceptions of its policy.

Appellant contended that a part of the damage was occasioned by the defective condition of the drums when shipped. In support of this contention it cites the testimony of Wallace and Wylie, master and mate of the "Sardhana". These witnesses based

their statement that some of the drums were defective solely upon the ground that creosote was observed in the limbers of the ship before they cleared the English Channel. The ship, however, receipted for this cargo as follows:

> "Shipped in good order and well conditioned by Blagden, Waugh Company in and upon the good ship called the 'Sardhana' * * * two thousand seven hundred and fifty-three drums of creosote oil."
>
> (Bill of lading, Libelant's Ex. "B".)

This bill of lading is certainly competent evidence to contradict the testimony of the ship's master. No exceptions as to the condition of the cargo were noted on this bill of lading. Captain Wallace further testified:

> "Q. Was not all of said cargo in apparent good order and condition when received on said ship?
>
> A. Yes. I rejected what we considered bad drums." (Record, cross-interrogatory 40, p. 113; Answer p. 125.)

Wylie testified to the same effect. (Record p. 159.)

Appellant admitted below that all of the damage, except the damage which it claims was caused by defective drums, was caused by "perils of the sea." The testimony clearly proves this. (Wallace,

Record pp. 111, 124, 125, cross-interrogatories 36 and 37 and answers thereto.)

It is admitted in this case that the "Sardhana" was seaworthy when she left London, that the cargo was properly stowed, and that the vessel met with unusually heavy weather during the course of the voyage, causing her cargo to work loose and become damaged. The damage to the drums was all external damage, they were dented on the ends, chimes were badly bent, they were stove in, and some of them had holes in their sides and they were all leaky. (Deposition of E. D. Rood p. 133; Libelant's Exhibit "I", Record p. 190.)

The clean bill of lading issued by the ship, and the testimony of Wallace and Wylie referred to above, are conclusive evidence that externally the goods had been shipped in good order and condition, and it being proved that the damage to the drums resulted from some external source, respondent, in order to free itself from liability, must prove that the drums were damaged or defective when shipped.

The Peter der Grosse, 1 P. D. 414.

Respondent's allegation, or rather contention, that some of the drums were inherently defective when delivered aboard the Sardhana, is an affirmative allegation on its part, and, under the rules of

evidence, respondent is required to prove such allegation by a preponderance of the evidence. We can see no difference between an allegation of defective condition of cargo, and an allegation of defective condition or unseaworthiness of a vessel, when it is set up as a defense to a claim against an insurance policy.

> "The allegation in the defendant's answer that the vessel was unseaworthy, was therefore an affirmative allegation on their part, and under the rules of evidence in such cases they are required to prove it by a preponderance of the evidence, and, failing in this, plaintiff was entitled to recover."
>
> *Nome Beach etc., Munich etc.,* 123 Fed. at p. 827.

But even if these drums were defective when shipped, still appellant would be liable, for there is no implied warranty in a policy on goods that the goods are seaworthy for the voyage.

Arnould on Marine Insurance, 7th Ed., p. 785.

This is especially provided in the *Marine Insurance Act* (1906), Sec. 40:

(1) (6 Edw. 7, Ch. 41, entitled an Act to codify the law relating to Marine Insurance.)

> "§40—(1) In a policy on goods or other moveables, there is no implied warranty that the goods or moveables are seaworthy."
>
> *Chalmers and Owens Marine Insurance Act,* p. 61.

If this case is to be decided according to English law and practice, as contended by appellant, then this act is binding.

Appellant will contend under Assignment 12 (as it did in the lower court) that before the appellee can recover it must show that the creosote was *on board* the Sardhana at the time the fire occurred on November 18th which deleted this warranty.

This contention, however, is not well taken. When the F. P. A. warranty is opened by the happening of the excepted event (in this case the fire) the warranty is deleted and the policy construed as though the warranty was not, and had never been, attached to the policy, that is, any loss under the policy, whether partial or total, is adjusted according to the general terms of the policy. There is no doubt but that appellee is entitled to recover this partial loss under the general terms of the policy.

If the excepted event happened before the insured goods were placed on board the ship, there would, of course, be no liability for injury subsequently happening to the said goods, the policy not having attached at the time of the happening of the excepted event. On the other hand, if the fire

happened after the goods had all been safely landed, there would be no liability for injury or damage to the goods, sustained during the course of the voyage, the policy having expired at the time of the happening of the excepted event. If the goods, however, are damaged or lost during the course of the adventure for which they are insured, and the excepted event, in this case the fire, also happened during the course of the adventure, it is immaterial whether the goods were damaged or lost prior or subsequent to the fire, the warranty being deleted, the insurer is liable for all loss or damage to the insured goods as though the F. P. A. warranty had never attached. As we have said, the effect of the F. P. A. warranty is to except the insurer from liability for any partial loss or damage to cargo during the course of the adventure, while the goods are insured, unless the ship be "stranded, sunk or on fire." Upon the happening of the fire, in this case, the F. P. A. warranty was completely effaced, and the insurer is liable for all loss or damage to cargo, whether partial or total, which happened during the course of the adventure, in accordance with the general terms of the policy. It will not be disputed that the loss of a portion of the cargo during the course of the voyage for which it is insured, is a partial or

particular average loss, and by the terms of this policy, in the absence of the F. P. A. warranty, the insurer is liable for any partial or particular average loss. "The 'stranding' (in this case fire) contemplated by the memorandum must be one which takes place after the adventure on the memorandum articles has commenced and before it has terminated."

Arnould on Marine Insurance, Sec. 887.

Thames and Mersey Marine Insurance Co. vs. Pitts, 7 Aspinwall Maritime cases (N. S.), 302.

This question was considered in the case of *London Assurance vs. Companhia,* 167 U. S. 149, and all of the English cases reviewed. We quote from this case as follows:

> "Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, 'free of particular average unless the vessel be sunk, burned, stranded, or in collision.' The same rule applies to all, and if the vessel be either sunk, burned, stranded or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom.
>
> In *Harman vs. Vaux,* 3 Campb. 429, Lord Ellenborough held that the stranding is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation.
>
> In *Barrow vs. Bell,* 4 Barn. & C. 736, decided in 1825, the insurer was held liable, al-

though the cargo was not injured by the stranding, the injury having resulted from striking upon an anchor in the harbor. Abbott, Chief Justice, Bayley, Holroyd and Littledale, Justices, held the case of *Burnett vs. Kensington,* above cited, as entirely controlling, and that the insurers were liable.

In *Kingsford vs. Marshall,* 8 Bing. 458, decided in 1832, although the court held that in that case there was no stranding, yet Tindal, Chief Justice, recognized the general rule, and said: 'The question is whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum by reason of the ship being stranded; inasmuch as it has long been settled that the words "if the ship be stranded" are words of condition, and that if such condition happens it destroys the exception and lets in the general words of the policy * * *. For if the ship was stranded in Dunkirk harbor, an average loss upon the whole would be equally recoverable though it had happened from perils of the sea at any former time or any other place in the course of the voyage insured.' And he referred to *Burnett vs. Kensington* as authority.

In *Thames & M. Marine Ins. Co. vs. Pitts* (1893), 1 Q. B. 476, the court, in giving judgment, said: 'It is clear law that it is immaterial whether the actual mischief can be traced to the stranding * * *. If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average, whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but it is abundantly supported by

authority.' And he quotes from the judgment of Tindal, Chief Justice, in *Roux vs. Salvador*, 1 Bing. N. C. 526, in which the Chief Justice said: 'The general principle laid down in *Burnett vs. Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed, the policy, after the stranding, must be construed as if no such warranty had been written on the face of it.'

In the *Thames & M. Marine Ins. Co.'s* case, *supra,* however, the court decided that where the stranding took place before the cargo was laid and the risk commenced, and the loss occurred after the loading, that the insurer was not liable. In other words, the court held that the stranding must take place in the course of the adventure, and that where it occurred before the goods were loaded and when the cargo was not at risk in the ship, the insurer was not liable. * * *

The English text-writers on marine insurance recognize the rule to be as above stated. See 1 *Marshall, Ins.,* 2d Am. from 2d London ed., 222, 234; *Lowndes, Marine Ins.,* Sections 317, 319; *McArthur, Marine Ins.,* 245."

"From the review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided."

In the case of *Burnett vs. Kensington*, 7 T. R. 224 (English Ruling Cases, vol. 14, p. 187 at p. 198), Justice Kenyon, Ch. J., states:

> "The words of this policy are in general terms, including all cases; then comes this memorandum, 'corn fish * * * warranted free from average unless general or the ship be stranded.' This, therefore, lets in a general average, and I do not know how to construe the words grammatically but by saying that if the ship be stranded, then it destroys the exception and lets in the general words of the policy. If a general provision be made in any deed or instrument and it is there said that certain things shall be excepted unless another thing happen which gives effect to the general operation of the deed if that other thing does happen it destroys the exception altogether."

Justice Grose in the same case states:

> "On the words no doubt can be raised, they are clear. The insurers engage that certain articles, of which fruit is one, shall be free from average except in two cases—one if it be a general average, the other if the ship be stranded, but if either of these happen, then those articles are not to be free from average."

In the case of *Wells vs. Hopwood,* 3 Barn. & Ad. 29 (English Ruling Cases, Vol. 14 at p. 206), Justice Parke states:

> "In reading this memorandum two things are clear, first, that according to its grammatical construction, the simple fact of 'stranding' destroys the exception in favor of the enumerated articles contained in the memorandum, and in-

cludes them in the general operation of the policy, though no damage is thereby done to those articles."

Lord Tenterdon, Ch. J., in the same case states the law to be:

> "According to the construction that has been long put upon the memorandum, the words 'unless general or the ship be stranded' are to be considered as an exception out of the exceptions as to the amount of an average or partial loss provided for by the memorandum and, consequently, to leave the matters at large according to the contents of the policy."

Appellant in its argument below cited two English cases as supporting its contention. *Thames & Mersey vs. Pitts,* 7 Asp. Mar. Cases (N. S.) 302, and *Alsace Lorraine id.* 362. The first case is cited in *London Assurance Co. vs. Companhia,* 167 U. S. 149, cited above, as being a case where the stranding (the excepted event) "took place before the cargo was laid and the risk commenced." In the Alsace Lorraine a portion of the cargo had been sold and the balance had been forwarded by another ship at the time of the happening of the excepted event. These cases are not contrary to the rule as laid down in the cases cited by us. In the first case the policy had never attached, and in the second case, connection between the ship and her entire cargo had been

severed at the time of the happening of the excepted event.

Appellant contended in its argument below that if 56,267 gallons of creosote were lost from the Sardhana, such loss must have occurred during the voyage, that is, this creosote must have been pumped overboard or "jettisoned." The policy in this case covers both jettisons and general average losses. If this cargo was jettisoned during the voyage then the insured is entitled to recover irrespective of the F. P. A. warranty or the fire which happened on November 18th. Jettison is a general average loss. This policy covers all general average losses, and the insured has a right to recover his entire general average loss from his underwriter without seeking compensation from the other contributing interests.

Phillips on Insurance (3rd ed.), Vol. 2, Sec. 1348.

Potter vs. Providence Washington Ins. Co., 4 Mason 298.

19 *Federal Cases,* No. 11336.

Dickinson vs. Jardine, L. R. 3 C. P. 642 (English Ruling Cases, Vol. 14 at pp. 434-5).

Arnould on Marine Ins., 7th ed., p. 1023.

The only testimony as to this jettison of cargo is found on p. 191 of the record:

"Q. This report shows a loss here of 56,-267.2 gallons. Have you any knowledge as to how that loss occurred?

A. Well, I know that the creosote was not there, that the drums were leaky, and in my investigation I understood it was pumped overboard at sea.

Q. Would that be an ordinary precaution, if there was any great amount of creosote in the hold in rough weather?

A. Any great amount of loose liquid in the hold of a ship in rough weather would be a damage to the vessel."

And on page 217, on cross-examination:

"Q. What became of the 56,000 gallons that were missing?

A. I don't know. All I can tell you is what the crew told me, that it was pumped overboard.

Q. What member of the crew told you it was pumped overboard?

A. I think several of them. The captain did not, but the mates did.

Q. The mates. That is the only way that it could be accounted for?

A. That is the only way. It was not in the bark."

Naturally, if approximately one-fifth of the ship's entire cargo was in the shape of loose liquid in the ship's hold it would be dangerous to the ship during the rough weather she encountered, and if it was jettisoned for the safety of the ship, then it was a general average loss.

Appellant's last contention in its argument below was that the evidence showed that 427 drums had been delivered *prior* to the fire, and that in the absence of proof the presumption was that these were all damaged drums, and that therefore the creosoting company's claim should be reduced to this extent.

As we have shown in our argument above, the happening of one of the excepted events in the F. P. A. warranty during the course of the adventure, opens up or deletes the warranty, and the insurer then becomes liable, if at all, under the general terms of the policy. If there is a particular average or partial loss during the course of the adventure, and the excepted event occurs during the course of the adventure, then the insurer is liable for such particular average loss. In this case the damage to the drums was admittedly caused by perils of the sea occurring during the course of the voyage from London to Eagle Harbor. The fire occurred during the course of the adventure and immediately deleted the F. P. A. warranty, so that the insurer became liable for all damage or loss to cargo occurring during the course of the voyage, this being covered by the general terms of its policy.

Appellee proved that this cargo was shipped aboard the Sardhana in good order and condition, that it was damaged during the course of the voyage by perils insured against, and that the fire happened during the course of the adventure and while the goods were still at risk. If respondent seeks to avoid liability as to a portion of the cargo, upon the ground that it had been delivered prior to the fire, then the burden is upon respondent to prove that fact, the presumption being that the cargo was still at risk until the contrary is proven. This being an affirmative defense raised by the insured to defeat liability, it has the burden of establishing it. The only evidence on this point is the entry in the ship's log to the effect that 136 drums were *discharged* on November 17th and "Nov. 18th: Stevedores continued to discharge the cargo, and at 5 P. M. finished for the day. 291 further drums were *discharged.*" This entry in the ship's log, if competent proof, established the fact that the cargo had not been delivered but had been discharged on to lighters where it was still at risk. It does not show a delivery within the meaning of the policy of insurance. A discharge from the ship merely means the loading of said drums onto lighters alongside the ship. The policy in this case covers "risk of craft and/or raft

to and from vessel," also "including all risks of * * * craft, lighterage, and/or other conveyance * * * *from the vessel until safely delivered into warehouse.*"

Respondent's witness Tuttle, testifying with respect to the lighter which capsized, gave the following testimony:

> "Q. Did they tow her to the dock of the Creosote Company that night?
>
> A. No.
>
> Q. Would they not have done that if she had been fully loaded?
>
> A. There is lots of times they left the scows loaded for a day or two.
>
> Q. Fully loaded?
>
> A. Yes, sir.
>
> Q. Out on the bay?
>
> A. They would move them up some times alongside the ship forward, and move them around and moor them."
>
> (R. p. 95.)

The entry in the log book to which we have just referred shows that the stevedores quit work at 5 o'clock, having unloaded 291 drums from the ship into the lighter. The stevedores having quit work, these 291 drums, of course, were not towed to the Creosoting Company's plant and discharged into the

warehouse on that night, and were still at risk and covered by the policy. As to the 136 drums which were discharged on November 17th, or the day before the happening of the fire, we submit that the testimony of Mr. Tuttle as to the practice of leaving these scows moored in the bay, is at least *prima facie* proof that these 136 drums were also aboard the lighter at risk and covered by the policy.

There is ample evidence in this case, however, to show that the drums unloaded from the ship into the lighters before the happening of the fire were not damaged drums.

In answer to the 25th interrogatory, Captain Wallace stated that the cargo was loaded in the lower hold and tween decks (Record, p. 117). In unloading this ship it would, of course, be necessary to unload the cargo from tween decks before the cargo in the lower hold could be reached. The ship's log shows that at the time of the fire, the after tween decks were still full of cargo. (Entry of November 18, 1908; Libelant's Exhibit "L.") The stevedores commenced unloading cargo on November 17th, unloading 136 drums onto lighters on that day, and continued to unload cargo on the following day, the 18th, unloading 291 drums onto lighters on that day. It being necessary to unload the cargo from tween

decks before the cargo in the hold could be reached, and the evidence in this case showing that at the time of the fire cargo had been unloaded from the after tween decks, the cargo which was unloaded on the 17th and 18th of November, must have been unloaded from the tween decks. Mate Wylie, in answer to cross-interrogatory 15, testified that at the time of the fire the after tween decks were only *partly full of cargo* (Record p. 153). (Record p. 195.)

In answer to the 28th interrogatory (Record, p. 118), Captain Wallace stated that there was a small leakage all over the cargo, but that the biggest leakage was in the fore lower hold and amidships, abreast of the main ventilator, where creosote drums broke adrift and were found to be cut. In the ship's log, under date of July 29th, we find an entry "Toward night it was discovered that the cargo in the *hold* had commenced to work. The crew entered the hold from the lazarette and secured it as well as possible." In fact, in going through the entries in the log book, we find that when the cargo broke loose, the crew entered the hold to re-stow it, showing conclusively that the damage to drums by working of cargo on account of heavy weather was all in the hold of the ship, there not being a single entry

in the entire log that any of the cargo in the tween decks broke loose or was damaged.

The cargo discharged onto lighters on November 17th and 18th being taken from the tween decks, where no cargo had broken loose or worked during the voyage (this cargo being well stowed and in good condition upon arrival) (Record, p. ....), did not include any of the drums which were damaged, these drums being all in the lower hold.

As stated before in making our argument in this case, we have been at a great disadvantage by reason of the fact that we have not received a copy of appellant's brief, and therefore have been unable to answer appellant's argument in a logical manner. We have acted upon the presumption that appellant would raise the same contentions here as it did in the court below (all such contentions being covered by its Assignments of Error) and have endeavored in this brief to answer all such contentions.

Since writing the foregoing brief, we have this day, October 13, 1914, received copy of appellant's brief. We will not have time to answer this brief in any detail if we comply with the rules of this court as to the time of filing and serving our brief. We think, however, we have fully covered the different contentions made by the appellant, being practically the same argument which appellant made in the court below.

There are many statements in appellant's brief which are manifestly unjust and unfair to the appellee herein, and which are not sustained by any testimony in this case. Such a statement is that at the top of page 3, where appellant infers that this fire was of fraudulent origin for the purpose of opening up this F. P. A. Warranty. There is certainly no evidence of this fact, and we think that counsel should be severely criticized for making any such statement. The testimony does show that there was no officer, agent or representative of the appellee company on board the bark "Sardhana" on the night of the fire, but that she was entirely in charge of her officers and crew, the fire having occurred about 9:30 p. m. The attitude of the officers and crew of the "Sardhana" has been antagonistic toward this appellee throughout the

trial of this case. Appellant states, on the same page, that instead of attempting to enforce our claim against the ship for this loss and damage at a time when the matter was fresh in mind, the appellee, without notice of any claim whatever, waited for two years until the witnesses had become scattered, and then started this suit. It is significant that the appellant did not allege in this case as a defense, or otherwise, that the appellee had never given it notice of loss and proof of same, as required by its policy, and had not made a demand upon it for the amount of its loss prior to the bringing of this suit. Counsel for appellant knows, and this court knows, that, in accordance with the practice of merchants and underwriters, where the merchant is covered by insurance placed with several companies, in case of a partial loss coming within the terms of the various policies, it is necessary to have a particular average adjustment made so as to apportion the loss to the various insurance companies in the proportion the amount of their policy bears to the total insurance carried. This adjustment was made and bears date of May 18, 1909. Appellee alleged and the appellant admitted in the court below that a demand had been made against it for its proportion of this loss. Naturally, the

appellee, having sustained a loss and damage of approximately $10,000, would not sit idly by for a period of two years without making any claim or demand whatever, and then suddenly commence this expensive litigation to recover such loss and damage without giving the various underwriters any opportunity of paying their proportion of such loss.

Appellant's statement, on page 2, with reference to discharge of a portion of this cargo prior to the fire of November 18th, that part of said cargo had been "delivered" to the assured, and that the assured had "taken part of the cargo into its warehouse and was engaged in discharging and receiving the balance," is not sustained by a particle of evidence in this case. The only evidence on this point is the entry, under date of November 18th, as shown in the extended protest, to the effect that some 400 cases had been discharged into lighters, 291 of which this statement clearly shows were in lighters alongside the ship at the time of the fire.

Appellant's argument under subdivision 1 is, in our opinion, based upon an erroneous construction of the decision in the *Glenlivet* case. As the court will see from our citations above to *Arnould on Marine Insurance, the London Assurance vs. Companhia,* 167 U. S. 149, the *Glenlivet* case does not

decide that a vessel must be "burnt" *as a whole* in order to delete this warranty. It merely decides that the ultimate fact as to whether or not a ship is a "burnt ship" within the meaning of this F. P. A. warranty, is to be decided from the facts as they appear in each case in accordance with the *"ordinary use of the English language."* Manifestly, the word "burnt" as applied to a ship is not synonymous with the words "on fire." It would require much more burning of a ship to constitute her a "burnt ship" than it would to enable one to say that a ship was "on fire."

The appellant's contention under this heading that the F. P. A. warranty is an exception to the policy in favor of the *assured* and should, therefore, be construed most strongly against the assured, is a novel proposition of law. This court has squarely held in the case of

Canton Insurance Office vs. Woodside, 90 Fed. 301,

that this F. P. A. warranty is an exception in favor of the insurance company and should be most strongly construed against the insurance company or insurer. The wording of the policy is entirely that of the insurer. The body of the policy covers any partial or particular average loss, while this

F. P. A. warranty makes an exception in favor of the insurer so that the policy only covers for a total loss, unless one of the excepted events happens.

It is true that Mr. Beckett testified in this case that the words "on fire" were added to this F. P. A. warranty for the purpose of giving the insured better protection, and that the insured demanded this additional protection. In giving this testimony, however, Mr. Beckett was referring to the substitution of the words "on fire" for the word "burnt" in this F. P. A. warranty, subsequent to the decision in the *Glenlivet* case. This sustains our contention that the words "on fire" were substituted for the word "burnt" for this very purpose of giving the insured better protection, or of giving him the same protection as it was understood between the insurer and the insured, prior to the *Glenlivet* case, was given him by the word "burnt". This, however, is far from saying that the F. P. A. warranty was attached to the policy for the benefit of the insured, but even if it were true that this warranty was attached so as to give the insured better protection, this could only be done by agreement between the insured and the insurer, for which protection the insured would have to pay additional premium. The wording is that of the insurance company, and,

in a case of any doubt or ambiguity, it is strongly construed against it.

This is the principle decided in the cases cited by appellant on page 15 of its brief.

As we have fully covered the testimony as to the extent of the fire on the "Sardhana", we will not take the court's time in reviewing that testimony here. We would, however, call the court's attention to the testimony of Captain Wallace and First-Mate Wylie of the "Sardhana", quoted on pages 20 and 21 of appellant's brief. Both of these witnesses state that the only repair made necessary by this fire was to give the burnt door "a coat of new paint," or as stated by witness Wylie "simply a rub with a paint brush." An inspection of the door, which is in evidence as an orginal exhibit in this case, will clearly show that this testimony is not true. Appellant's testimony in this case shows that no repairs were made as the result of this fire. But this is not a criterion as to whether or not the vessel had been on fire. In the opinion of a disinterested marine surveyor, this vessel was damaged to the extent of $150 to $200, and should have been repaired. Whether she was or was not is immaterial.

On page 27, appellant again makes a statement that the entries in the protest are entitled to no consideration whatever because, as it claims, this protest was prepared for use against the appellant in this case. In the first place, this statement is inconsistent with the other statements made by appellant to the effect that this suit was an afterthought on the part of the appellee, and that no demand or claim was ever made against the appellant until two years after the fire. If this protest was prepared for use against appellant it was not prepared for use in this case, or in any case, but was prepared as a part of appellant's proof of loss, which shows that immediately after the damage was ascertained, appellee was diligent in securing its proof of loss for the purpose of making its claim against the underwriters. It is admitted, however, that the entries in this protest are copied from the ship's log, and as there is no contention that the appellee in any way influenced the officers of this ship in making up their log-book, and as the master and mate both testify that the entries in the log-book are correct, we can see no merit in appellant's claim that the appellee in any way influenced the officers in making out this protest.

Appellant contends, on pages 28 and 29, that Mr. Frank Walker's testimony is not to be believed for the reason that he testified that the contents of the damaged drums were taken by *meter* readings, and that Mr. Beal, the superintendent, testified that there was no meter on the tanks in which these drums were emptied. Mr. Walker's testimony was given some four or five years after the contents of these drums had been measured, and naturally, the details of just exactly what manner of measurement was made would not be clearly in his mind. His understanding of what a meter is might be different from that of Mr. Beal, who testified that what he meant by a meter was a device through which the creosote was run and which registered the number of gallons. What Mr. Walker meant by the word "meter" is not shown, nor do we think it material. He testified that he was in attendance for the purpose of finding out the shortage, if any, and the amount of damage to drums, and that at the time he made his report, he satisfied himself that the same was correct.

Appellant argues on page 33 that the applicant for insurance should have made it clear to the insurance company as to what protection he desired, or rather, what he construed the words "on

fire" to mean. The court will notice that both the policy and the warranty are in printed form, and it seems to us clear that it was the *duty of the insurance company to have so worded this policy and the warranty that there would be no cause for ambiguity.* In other words, that if the insurance company intended to limit its liability under the words "on fire" beyond the ordinary meaning of such words, it should have so inserted the limitation in its policy. It will be noted in connection with the words "in collision" that the insurance company has noted such limitation. It is not the duty of the insured to word the policy, nor would the insurance company allow the insured to dictate to it the wording of its own policies.

Appellant's statement on page 35, that Mr. Beckett's (the average adjuster of London, England, referred to by Judge Neterer in his decision in the lower court) experience prior to 1911 as an average adjuster is "not revealed," is an incorrect statement of fact. The record in this case shows that Mr. Beckett has been an average adjuster since the year 1897, and previous to his connection with Johnson & Higgins he was connected with the firms of F. C. Dawson & Co., of Liverpool, England, and

Manley, Hopkins' Son & Corliss, of London and Liverpool, England. (Record p. 228.)

Appellant spends a large amount of time in criticising the testimony of Mr. Beckett, but has offered no testimony whatever to contradict Mr. Beckett's testimony as to the practice of English underwriters and adjusters, in construing this F. P. A. warranty. If Mr. Beckett's testimony on this point was not correct, appellant could very easily have obtained competent testimony to contradict it. Appellant did take testimony in London, England, in this case, but it did not seek to take any testimony on this particular point, although contending throughout the trial of the case that this policy was to be construed according to English law and practice.

Under the next heading, appellant contends that the lighter which capsized on November 21st was unseaworthy at the time the cargo was loaded aboard her. As stated in our argument above, under this head, there is no warranty of seaworthiness as to such a lighter used in discharging cargo. The New York case cited on page 41 of appellant's brief was that of an instance where flat boats were used upon a distinct stage of the voyage, and the warranty of seaworthiness in that case would be a war-

ranty which is implied under the doctrine of voyage in stages as to each separate stage.

Examination of the testimony of Mr. Yeaton, referred to on pages 44 and 45, for the purpose of showing that there was no unusual weather on the night that this lighter capsized, will show that at the time Mr. Yeaton was not on watch, and knew absolutely nothing about the weather on the night in question and was probably asleep until he was awakened at the time the lighter capsized.

The testimony shows that Eagle Harbor was a land-locked harbor and considered perfectly safe (Record p. 265). While this lighter might not have been seaworthy in the sense that it would stand weather which is ordinarily encountered in the open sea, still there could be no doubt but that it was seaworthy for a land-locked harbor. The term "seaworthy" is a relative term. What would constitute seaworthiness under certain conditions would not constitute seaworthiness under other conditions.

> "It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprises. 'The ship,' said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter' on the voyage. That state of re-

pair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another. * * *''

Arnould on Marine Insurance, Vol. 2, Section 710.

Appellant's statement, on page 59, that it was the custom of the creosoting company to tow these lighters away from the ship as soon as they were loaded, and that the creosoting company was negligent in leaving this lighter alongside the ship over night, is not borne out by the evidence, and appellant's own witness Tuttle testified, as we have stated above, that it was customary when a lighter was loaded to either leave her alongside the ship, or to tow her to a buoy in the harbor, sometimes leaving her there for two or three days. The testimony also shows, as we have stated above, that the unloading of the "Sardhana" was entirely in the hands of the Washington Stevedoring Company, under the supervision of the master of the "Sardhana" (Record p. 123; Answer 21st Int.), and that the appellee had nothing whatever to do with these lighters. The testimony does not show that this lighter was fully loaded. In fact, we think the testimony shows to the contrary, as it is admitted that this lighter had 272 drums on her at the time the longshoremen quit work for the day, while the

protest shows that the lighter which was left alongside of the bark "Sardhana" on the night of the fire had 291 drums aboard.

Under the next heading, on page 67, appellant contends that as Mr. Walker's survey is dated December 28th, and as the testimony shows that the contents of the drums discharged from the "Sardhana" were not all emptied until some time in March, that this conclusively shows that Mr. Walker made out his survey report before the drums were discharged. Mr. Walker's survey report, however, is not dated December 28th. It merely shows that he was in attendance at Eagle Harbor from November 17th to December 28th, 1908. Mr. Walker did not contend that he was in attendance at Eagle Harbor during all the time that the entire cargo discharged from the "Sardhana" was being emptied. In making his survey, Mr. Walker merely *measured the contents from the 741 damaged drums* which were partially empty at the time of being discharged. Mr. Beal, the superintendent, testified that these damaged drums were emptied first, that the leaky drums were emptied immediately upon being discharged from the "Sardhana" (Record p. 91). Mr. Walker would, of course, have no interest in watch-

ing the discharge or dumping of the drums which turned out in good order and condition.

On page 88, appellant contends that the entries in the protest show drums were found "adrift and rolling about in all directions," that these drums must have been on top tiers, and that, therefore, these drums were discharged first, and from this he concludes that of the 400, and some odd drums, which were discharged on lighters previous to the fire, they must have all been damaged drums. The fallacy of this argument, however, is that the entries in the protest show that the cargo which broke loose during the voyage was all in the *hold* of the ship. Before unloading this cargo, of course, it would be necessary to unload the cargo of the 'tween decks. The testimony of Mate Wylie shows that at the time of the fire a portion of the cargo had been discharged from the after 'tween decks, there being no testimony to show that any of this cargo ever broke loose or worked during the course of the voyage, so that it was in any way damaged, the testimony being that when the ship arrived at Eagle Harbor the cargo on her 'tween decks was in good condition and well stowed.

As we have answered the remaining portions of appellant's brief rather fully, we will not take up

the court's time in considering the appellant's argument in detail.

In conclusion, we respectfully submit that the appellee has proven by direct and positive testimony the entire amount of loss claimed by it; that it has proven this loss was all occasioned by perils insured against; and that it has proven that the "Sardhana" was "on fire," within the meaning of the F. P. A. warranty, to an extent sufficient to delete the said warranty and to entitle it to recover for the particular or partial loss as claimed.

These being all questions of fact decided by the lower court, upon disputed testimony, and there being ample and sufficient evidence in the case to sustain the lower court's conclusions, we respectfully submit that the decree of that court should be affirmed and that the appellee should be allowed its costs on its appeal.

Respectfully submitted,

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE.

No. 2458

In the

United States Circuit Court of Appeals

For the Ninth Circuit

Thomas & Mersey Marine Insurance Company, Ltd. (a corporation),

Appellant,

vs.

Pacific Canning Company (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.

Filed this _____ *day of November, 1914.*

Filed

FRANK D. MONCKTON, *Clerk.*

NOV 6 - 1914

By _____ *Deputy Clerk.*

F. D. Monckton,
Clerk.

Pioneer Printing Company

No. 2459

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD. (a corporation),
Appellant,

vs.

PACIFIC CREOSOTING COMPANY (a corporation),
Appellee.

APPELLANT'S REPLY BRIEF.

CONSTRUCTION OF F. P. A. CLAUSE (Appellee's Brief, 10-13).

Appellee seems to lay great stress on the fact that both Judge Hanford on exceptions and Judge Neterer on the trial took the view contended for by it, and says that these two decisions are *"entitled to great weight"*. We have already shown, as to Judge Hanford's decision, that it was rendered upon the exaggerated statements of the libel as to the extent of the fire, namely: that *"the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts"* of the ship were burned (Libel, Record, 5); and the decision expressly refers to the *bulkhead* as being a part of the ship burned (Record, 322). As

to Judge Neterer's decision, it is clearly erroneous because it holds that the *allegations of the fire's extent, as shown by the mate's log, are "sustained by the evidence"* (Record, 326), the said log reciting that the *"bulkhead, together with the door thereof, * * * were burned"* (Id., 326-327). Furthermore, Judge Neterer's decision is based upon an erroneous conception as to what is shown by the evidence as being the result of the Glenlivet decision, the court saying: *"After this case was decided the words 'on fire' were substituted for the word 'burned'."* The only evidence in the case touching this matter is that of Mr. Beckett, who testifies that *" 'Burned' has not been left out of the clause but 'on fire' has been added"* (Record, 232). And Gow confirms Mr. Beckett's statement when he says: *"Since the issue of the decision some slips have had the words 'on fire' added to 'burnt' "* (Gow, 181).

We submit that the construction may well be different where, instead of an *addition* to the word 'burnt', there is before the court a clause with no showing that any part of it was intended to supplement anything. The situation calls solely for a construction of the clause reading: *"stranded, sunk or on fire"*, and in support of our contention as to its meaning we invoke the principle upon which the clause *"stranded, sunk or burnt"* was construed.

Judge Neterer's reference, by way of comparison, to the memorandum in the body of the policy reading: *"sunk or burnt"*, and the slip reading: *"sunk or on fire"*, to the effect that the use of both expressions clearly evidences a purpose in the minds of the parties

to make a distinguishment is far from convincing. In fact, if the word "*burnt*" is given, as in the Glenlivet case, a meaning which excludes the idea of *total* destruction, then the two expressions are entirely harmonious in their meaning; while on the other hand, if the principle of a substantial burning of the ship as a whole is applied to the exception in the memorandum and discarded as to the slip, the contract becomes inharmonious and ambiguous. Such a construction should be avoided if possible.

Assuming, as stated by counsel, that the form of the policy is furnished by the insurance company, and that it is drawn to evidence the intention of the parties (Brief, 14), we submit that the proper and only conclusion arising from the construction of the contract as a whole is, that the two exceptions,—"burnt" and "on fire",—were used with the intention that they should harmonize, and not that they should be read so as to be applicable to radically different sets of facts. From the underwriters' view there can be no escape from the proposition that harmony and not conflict was the intention. In view of the known construction of the former expression, it is inconceivable that the company, in framing the wording of the slip, should have deliberately so framed it as to make it ambiguous. No one, having in mind the Glenlivet decision, could say that, in the use by the company of the words of the slip, it was intended to destroy or disturb the favorable construction which had been given to the analogous subject matter expressed in the use of the word "*burnt*". Had such been the intention,

the ease with which it could have been shown is potent evidence of the contention that the framer of the slip had adopted the narrow meaning of the word *"burnt"*, and had expressed such meaning by using the analogous words *"on fire"*.

We submit that the statement of counsel that the use of the words *"on fire"* was intended to reinstate a situation which existed before the Glenlivet decision (Brief, 21), has no basis in fact, and to say that it has, is no more proper than for us to state that many policies *before* the Glenlivet decision used the words *"on fire"* and not *"burnt"*,—a statement which can be verified we believe by an inspection of some of the old forms.

As to Mr. Beckett's testimony that the burning of the bulkhead door, in his opinion, would open the warranty (Brief, 23), we submit that counsel need not stop there. According to *this* witness any structural part of the ship burned would delete the warranty, however trivial or to whatever extent the ship had been on fire. Furthermore, Mr. Beckett's testimony all applies to the warranty reading: *"stranded, sunk, burnt, on fire or in collision"*.

It is said that in the Glenlivet case *"no part of the fabric or structure of the ship itself was 'burnt' or 'on fire'"* (Brief, 24). (Note the analogous use made by counsel of the two expressions.) In this counsel is mistaken. Lindley, L. J., says:

> "* * * the fire was so severe that some damage was done to the structure of the ship; it

> is unnecessary to particularize it, * * * but it is sufficient to say that the fire clearly injured the ship''.
>
> *7 Asp.* (N. S.) 295.

Again, Smith, L. J., says of the fire:

> ''An angle iron buckled down and the wood casing was destroyed''.
>
> (Id., 396).

Again, in the statement of the facts preceding the trial court's decision, we find:

> ''There was some damage to the ship's plating, brick and wood casing and hatches''.
>
> (Id., 342).

Counsel says that Bouvier defines the words *''on fire''* as the *''effect of combustion''* (Brief, 30). This is precisely the definition which makes those words synonymous to the expression *''burnt''*.

Again, counsel says at p. 32 of brief, that the opinion of Mr. Walton, referred to at p. 31 of brief, clearly shows that the word *''on fire''* were substituted for the word *''burnt'' after* the Glenlivet decision. In this, we submit, counsel is in error, for in the opinion referred to, the expression *on fire,* is used within quotation marks, thereby showing that some policies *before* the Glenlivet decision contained the expression *''on fire''*, although the policy submitted to Mr. Walton contained the expression ''burnt''. Mr. Walton's opinion was directed solely to the question of whether the warranty was opened or not in the case of ship's stores being burnt, and he was of the opinion that, whether the expression was *''on fire''* or *''burnt''*, the combustion must be of some part of the fabric of the ship.

FACTS AS TO THE "SARDHANA'S" FIRE.

Under this head the decision of Judge Hanford on exceptions is quoted as showing that the words *"on fire" "are indicative of a happening whereby a ship is endangered by actual burning some part of it * * * A fire in that part of a ship* (bulkhead between decks) * * * *if not promptly subdued, would certainly be destructive and such a happening would be truthfully described by saying the ship was 'on fire'"* (Brief, 34). This test, we submit, is as equally applicable to the expression *"burnt"* as *"on fire"*, and yet in the Glenlivet case it was expressly rejected, Smith, L. J., saying:

> "Now I come to the suggestion of Mr. Aspinall that it (burnt) means the initiation of such a fire that, unless it were put out, it would consume the ship. I cannot think that can be the meaning of this for there never could be a fire which, if not put out, might not consume the ship."
>
> *7 Asp.* (N. S.) 396.

Counsel is not accurate, therefore, in his contention that Judge Hanford's test is not contrary to the law of the Glenlivet case, for we submit that it is in direct contradiction of it.

The only remaining matter under this head which requires further answer relates to the contention that the entries of the ship's log are governed by the English Merchants Shipping Act of 1894 (Brief, 38). Counsel again falls into error in supposing that the log in question is the *official* log required by this act. Usually there are on British ships a log kept by the mate, sometimes called the mate's log, and the official log required

by the Act referred to. The former is a diary of the ship's voyage, while the latter is in the form issued by the Board of Trade, in which certain matters must be entered as provided by section 240 and other sections of the act. These matters are convictions of offenses by the crew, illness or injury of the crew, marriages, births, deaths, names of seamen employed and discharged, wages and collisions with other ships, the amount of freeboard and various other matters of a similar character. These are the things which by section 240 of the act are made admissible as evidence. The mate's log, which contains a statement of the fire on the "Sardhana", is not an official log, and the entries found in it are not evidence of the facts enumerated, nor are they admissible against this appellant. The only office of which they are susceptible would be as an impeachment of the evidence of the witnesses signing the same and, if used for such purpose, are subject to rules applicable to the impeachment of witnesses. Both Wallace and Wylie admitted they signed the log, and that ends the matter. Under the sanction of a judicial oath their evidence was taken, and that evidence alone is the court's guide in this case. The facts set forth in the mate's log are not such as are required by the British Act and, therefore, are not evidence against the appellant of the facts contained therein on any theory known to us, and a fortiori, the protest, admittedly copied from the log, is not evidence against appellant of the facts stated in it.

Counsel suggests that the log is admissible in rebuttal of the master's and mate's testimony (Brief, 44). Here

again counsel is in error, for if it be admissible at all to establish the facts it contains, it is admissible for all purposes. But as we have said, its only legal use would be, not to establish the truth of the facts it contains, but to impeach or discredit the testimony of Wallace and Wylie, and, when used for such purpose, certain well known requisites must be complied with, which it is sufficient to say were not complied with here, even though it were admitted that there is any material *unexplained* difference between the log entries and the testimony. Of course, it is perfectly clear that the entries in the protest were made from the mate's log, for Capt. Wallace testifies that the appellee asked him for the *"mate's log book"* and he gave it to them (Record, 116).

Reference is also made to Mr. Walker's report of survey of this fire (Brief, 44), which report, upon examination and comparison, will be found to be a copy of the entry of the log. Of course, this ex parte report is not evidence, and yet we submit that it was from the facts enumerated in this survey report that the witness Walker testified (Opening Brief, 28). Much is said of the excitement and the precautionary measures taken on the occasion of the fire, but such matters are not necessarily evidence of the fire's extent, but in this case simply show the caution used to prevent what might have been a serious conflagration (see Record, 159-160).

Superintendent F. D. Beal's testimony with reference to the extent of the fire, illustrated by his diagram (Record, 96), has already received attention (Opening Brief, 30).

We admit that it is immaterial whether repairs were made or not (Brief, 55), but the fact that no repairs were considered *necessary* by the interested owners, has some bearing upon the question of the fire's extent.

SUE AND LABOR EXPENSES.

Under this head there are several matters to which brief replies should be made:

1. It is said that the lighter which capsized was but partially loaded, and that in accordance with custom it was left moored alongside the "Sardhana" for the purpose of completing the loading *"the following day"* (Brief, 57). This statement, which bears on the question of appellee's negligence, is not sustained by the record. Preece, the boss stevedore who loaded the barge, says it was completely loaded:

> Q. Was the barge completely loaded or not?
> A. Just finished.
> Q. Completely loaded? A. Yes.
> Record, 278.

Furthermore, this witness says it was the custom of the creosote people to tow these lighters when loaded away from the "Sardhana", but that in this particular instance it was not done (Id., 279). This evidence also meets appellee's claim (Brief, pp. 102-103) that the drums discharged before the fire were presumably still in the lighters and therefore still at risk. No such presumption can be indulged in and, moreover, the drums, even if still in lighters, were covered by a "separate insurance."

2. Counsel refers to the evidence of Superintendent Beal (Record, 69), as showing that the particular lighter in question was examined on the night she capsized *"after she had been fully loaded"* (a statement inconsistent with the contention that it was *not* fully loaded), and found to be all right (Brief, 60). This testimony of Mr. Beal's (Record, 70) will be seen to refer to an examination generally of the lighters made *before sending them out* to be loaded, and not an examination made after they were loaded. This evidence is further referred to as showing *"conclusively that the lighter was seaworthy at the time it was put into use"* (Brief, 60). Beal simply says that every night before sending the scows out they were sounded, and that, although there is always some water in them, there was not enough to be considered dangerous *"if she had remained as she was"* (Record, 70), but additional water got in during the night (Id., 71), and, in his opinion, that would be the only means of capsizing the lighter (Id., 80).

3. Counsel next says that *"it is possible that this lighter did sink or capsize because of water in it"*, and then makes the contention that the water did not come through open seams but through open hatches (Brief, 61-62). Although no one knows whether the water came in through the sides or from the top, it obviously makes no difference on the question of the lighter's fitness or seaworthiness. If her hatches permitted of water passing down into her hold, so as to list her and cause capsizing, the lighter was just as unseaworthy as if the water came in through her seams and accomplished the same result.

4. It is next said that if the appellee had furnished the lighters there might have been some ground for our contention of an implied warranty of seaworthiness (Brief, 64), but the facts show, however, that "*appellant*" (appellee) did not own or furnish the lighters (Brief, 64), but that they were furnished by the Washington Stevedoring Co. (Id., 65). It is true that the lighters were not *owned* by the appellee, and were *furnished* by the Washington Stevedoring Co., and that the master of the "Sardhana" superintended the discharge of his ship into them; but the situation cannot be thus technically met. *Who furnished the Washington Stevedoring Co.?* Surely not the owners of the ship, for their liability ceased at the ship's tackles. Surely not the Thames & Mersey Marine Insurance Co. It is futile for appellee to avoid responsibility on this point. The use of these lighters was for appellee's benefit; the appellee inspected them at night before sending them out (Record, 70); when they were loaded the appellee towed them away (Id., 279), and when this particular scow capsized it was appellee's surveyor who surveyed it for the purpose of ascertaining its condition.

Under these circumstances, the liability as matter of law rests upon the appellee.

EXTENT AND CAUSE OF LOSS (Brief, 71).

Pages 71 to 78, inclusive, are devoted by counsel to a statement tending to show a short delivery of 56,267.2 gallons of loose creosote. Even assuming the truth of

every fact stated, there is still to be shown a loss of creosote through a peril insured against. Such loss has not been shown, for *"short delivery"* is not one of the enumerated perils of the policy. If it had been, we hardly think the insurer would have been satisfied with an ex parte measurement of the drums' contents either at the port of shipment or the port of discharge. On the other hand, all the facts of the case negative the *necessary* claim of a loss through a peril insured against,—the "Sardhana" was seaworthy, did not leak, no creosote was pumped overboard and all loose creosote was delivered. The trial court did not seem to think it necessary, however, that it be shown that the creosote loss was occasioned by a peril insured against, for it says:

> "The ship Sardhana being seaworthy when she left London, the cargo in good order and condition when received by the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libelant is entitled to recover his damage."
>
> (Record, 331).

Counsel characterizes the evidence of Capt. Wallace, Mate Wylie and Apprentice Yeaton to the effect that the "Sardhana" did not leak and took no water during the voyage as negative testimony (Brief, 80), and, in impeachment of Capt. Wallace, quotes testimony he is said to have admitted giving in the case of the "Jupiter", where he says the *"Sardhana"* took in a lot of water on deck at times (Brief, 81). Counsel says that, in view of this admitted fact that the *"Sardhana"* took considerable water, it is inconceivable that the

pumps were not used once on the voyage as testified to by both Wylie and Yeaton (Brief, 82), and that the log entries: *"Pumps, lights, and lookout carefully attended to"* are significant.

This court will clearly see that counsel is led into error when he assumes that, because a vessel ships water during rough weather, it follows that water passes into the hold, and as a consequence the pumps are used to get rid of it. Neither the deck nor hatches of a seaworthy ship permit of water passing into the hold, and it is a common occurrence, known to all seamen, to have a ship take water on her decks in rough weather. Such is always to be expected, even of seaworthy vessels, but water so taken on board a seaworthy ship does not pass into the hold, nor does it necessitate the use of the pumps.

For counsel to refer to the finding of the court, in the case of the *"Jupiter"*, that *"most of the spillage was pumped out of the ship and wasted"* (Brief, 85), in support of a similar contention in this case, where the proof is that *none* of the *"spillage"* was pumped out of the ship or wasted, is, we submit, improper. We are not familiar with the evidence given in the case of the *"Jupiter"*, but, if the court made the finding referred to, there must have been proper evidence to support it; whereas, in the case at bar, the evidence is the other way.

Appellee's witness, Walker, it is true, when asked what became of the 56,267.2 gallons of missing creosote, says:

> "I don't know. All I can tell you is what the crew told me, that it was pumped overboard."
>
> (Record, 217).

But, of course, this hearsay of the witness will be given no consideration.

Appellee's excuse for not libelling the *"Sardhana"* for this claimed shortage of creosote, which nobody can account for, is that because of the wording of the charter party consignee was compelled to pay freight on the number of drums delivered, irrespective of their condition or contents (Brief, 85). What that situation has to do with a claim for short delivery against the ship, we are at a loss to understand. Counsel refers to appellee's inability to prove directly that the creosote was pumped overboard as arising through the antagonistic attitude of the mate and master of the *"Sardhana"*. This is a remarkable contention. The evidence of both these witnesses was taken by written interrogatories, not one of which, propounded by the appellee, was directed towards the ascertainment of the fact of creosote being pumped overboard. And we submit furthermore that the answers to all of appellee's cross-interrogatories are fairly made, and show no trace of an antagonistic attitude towards the appellee. We presume that the *dispute* between the appellee and the ship, referred to by counsel in this connection (Brief, 85), is supposed to find support in the following testimony of H. E. Stevens, appellee's bookkeeper:

> Q. Mr. Stevens, state if you know whether any claim was made against the ship for shortage, short delivery of this shipment.
>
> A. We protested against payment of freight, but the charter party was made out and the number of drums being delivered, that we were to pay on the number of drums delivered. We were compelled to pay the freight.
>
> (Record, 170).

We know of no other evidence on the subject that counsel could point to, and we submit that if the foregoing is all, then to claim that it establishes a *dispute* is preposterous.

At p. 86 of the brief we call the court's further attention to the assertion there made that the burden is on the appellant to prove that there was no loss of creosote. We deny any such obligation, and assert that, not only is the burden on the appellee to show clearly that there was a loss, but also, what is more to the point, a loss arising through a peril insured against.

As to the damaged drums, and counsel's criticism of appellant for its failure to produce the tally sheet of the witness Wylie (Brief, 86-87), we have already referred to this matter in our opening brief as being one of the results of this delayed litigation (Opening Brief, 80). Wylie doubtless tallied the cargo so as to check up the bills of lading. Finding no claim was made against the ship for shortage, his tally sheets would have no further value. But counsel further says that *"if this tally (Wylie's) varied from appellee's, why did not appellant produce the custom house tally?"* (Brief, 87). The reason that appellant did not produce this tally is that there is no evidence of its existence, and moreover we venture the opinion that, though the tally of the customs authorities had been available, it would not necessarily have shown the number of damaged drums, for that the drums may have been dented was of no concern on the question of duty to be paid. Furthermore, as the burden of proving the number of drums damaged was on the appellee, and

as it produced *no tally sheet of its own* in support of this burden, we assume that, had the proof been available from the customs authorities, appellee would have seen to its production. While appellee has probably shown damage to creosote containers, caused by perils insured against, it fails utterly to answer our contention that, as the evidence shows a loss or damage before the vessel encountered any of the perils insured against, as well as a loss or damage from such perils, the burden is on it to show the quantum of loss for which appellant is liable.

As to counsel's attempted answer to the contention that the F. P. A. warranty is only opened as to goods on board at the time of the fire, we submit that it fails. We do not controvert the principle of law that the happening of the excepted event deletes the warranty, even as to damage caused by some other peril. What we do contend, however, is that the goods must be at risk on board the ship, or craft, at the time of the happening of the excepted event, and as to loss or damage to goods not so on board the warranty is not opened. This is clearly the law, as shown by the cases cited by us. In attempting to meet this legal situation, however, counsel contends that none of the damaged drums had been discharged from the ship before the fire, and bases such contention on the inference that all the damaged drums must have been in the hold of the vessel, and that the discharge of the first two days preceding the fire must have been from the between decks, where there was no damage. This is an unwarranted inference. No evidence is cited to directly sustain this

view, and the inference is drawn from certain entries in the mate's log. Let us briefly look into this matter.

It will be noted that the boss stevedore, Preece, says that the *'tween deck* cargo adjacent to the bulkhead, where the fire occurred, had not been discharged at the time of the fire (Record, 282). Furthermore, the "Sardhana" had but one clear hold, but with 'tween deck beams seven feet below the main deck, on which beams, around the ship's sides, are laid a deck four or five feet wide on which cargo was stowed. The lazarette communicates with the hold through the sliding door that was on fire, and when the drums shifted at sea the hold was entered through the sliding door (Record, 161). This description of the ship by Capt. Wallace destroys the inference made by counsel from the log entries, for clearly, when the use is made in the log of the word *"hold"*, there was no purpose to distinguish between the hold and the 'tween decks. When the drums were chocked off at sea the sliding door remained open, *"it being jammed by the creosote drums"* (Id.). This jamming of the drums was *between decks,* and clearly shows that the entry of September 4th in the log: *"The drums were found to be adrift and were rolling about in all directions"*, alludes to the 'tween deck cargo as well as to the hold.

Furthermore, Capt. Wallace testifies that there were damaged drums among the 427 discharged prior to the fire, for he says:

> "At the time of the fire we had discharged 427 drums, some of which were no doubt slightly damaged."
>
> (Id., 162).

This shows that there were damaged drums discharged *before* the fire and, if appellee has failed to prove the exact number of them, it follows that it has also failed to show the number remaining at risk on board at the time of the fire.

Reference is made to the testimony of Mr. Beal (Brief, 119) to meet our suggestion that the loss of creosote probably resulted from appellee's delay in measuring it (Opening Brief, 71). Despite Mr. Beal's testimony that the damaged drums were not left in the yards of appellee, but such as leaked were dumped at once (Record, 91); we contend that the record abounds with proof that this statement is not accurate. In the first place, there is no proof showing a separate measurement of leaking or damaged drums from undamaged ones. If the two classes of drums had been separately measured, there would certainly have remained some evidence showing the quantity measured from the damaged drums. Beal was expressly questioned on this matter:

> Q. Do your records there show the dates this creosote from the damaged drums were dumped and measured?
>
> A. No.
>
> Q. You testified they were dumped somewhere from the latter part of November to the 8th of March; do you know upon what dates during that period they were dumped?
>
> A. No, I could not tell from this record. These notations just show that they were dumped between those dates.
>
> (Record, 91).

The record is clear that all of the claimed 741 drums were so damaged as to be unmerchantable (Barnaby,

224), and, if so, they must all have been leaking, for a dent without a leak would certainly not make the drums unmerchantable. Walker's survey report shows that every one of the damaged drums leaked (Record, 22). Barnaby says: *"I don't think that there were any that I saw more than half full"* (Record, 225).

If there was a shortage of 56,267.2 gallons, then, as each drum contained about 109 gallons, there must have been such a leakage as would empty 515 full drums. However, the principle remains the same, no matter whether they were damaged or undamaged drums which were left from November to March unmeasured. No one knows what happened to the contents of even full drums left unmeasured in appellee's yard during such a length of time. The matter is not of special importance, and was only referred to by us by way of suggesting a reason for the shortage.

In the case of the *"Jupiter"*, where the shortage was 51,321 imperial gallons, approximating very closely 56,267.2 U. S. gallons, the *reason* for the shortage appears while, in the case at bar, there is an entire absence of evidence showing a shortage through a peril insured against.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.

No. 2460

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK D. COOPER,
Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

GEORGE HEATON,
Defendant, Not Joining in Appeal.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Montana.

JAMES A. WALSH,
Solicitor for Appellant, Helena, Montana.

HON. B. K. WHEELER, U. S. Attorney,
Solicitor for Appellee, Helena, Montana.

NAEGELE PRINTING CO., HELENA, MONT.

No.....

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK D. COOPER,
Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

GEORGE HEATON,
Defendant, Not Joining in Appeal.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Montana.

JAMES A. WALSH,
Solicitor for Appellant, Helena, Montana.

HON. B. K. WHEELER, U. S. Attorney,
Solicitor for Appellee, Helena, Montana.

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In the District Court of the United States, in and for the District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs. No. 946.

FRANK D. COOPER and GEORGE HEATON,

Defendants.

BE IT REMEMBERED, that on the 7th day of December, 1909, complainant filed its Bill of Complaint herein, in the words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

FRANK D. COOPER and GEORGE HEATON,

Defendants.

IN EQUITY.

BILL OF COMPLAINT.

To the Honorable, the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana:—

The United States of America, by George W. Wickersham, Attorney-General of the United States, and James W. Freeman, United States Attorney for the District of Montana, brings this bill of complaint against Frank D. Cooper, a resident of the State of Montana, and George Heaton, a resident of the Southern District of the State of Iowa, the defendants herein, and thereupon your orator complains and says:

FIRST:

That on and prior to the 19 day of June, A. D. 1902, your orator was the owner in fee simple of those certain public lands situated in the state and district of Montana and within the Helena Land District, and now within the land district of which the land office is at Great Falls, Montana, and more particularly described as follows:

The Southeast Quarter of the Southwest Quarter of Section Eight (8), the east Half of the northwest Quarter and the southwest quarter of the northwest quarter of Section Seventeen (17), township Nineteen (19) North of range three (3) West, containing one hundred and sixty (160) acres of land, situated, lying and being in the county of Cascade, state and district of Montana, and within the jurisdiction of this court.

That one Jay C. Freeman, on the said 19 day of June, A. D., 1902, under and by virtue of the provisions of Section 2289 of the Revised Statutes of the United States, made and filed in the local land office of the United States, at Helena, in the State and District of Montana, his application No. 13568, to enter as a homestead the lands hereinabove described.

SECOND:

That at the time of the filing by the said Jay C. Freeman, of his said homestead application No. 13568, to enter the above described lands and premises, and contemporaneously therewith, he likewise filed in the said local land office of the United States, as required by law, his affidavit and statement in writing under oath, in which, among other matters and things, he stated and deposed that his said application to enter said land as a homestead was honestly and in good faith made for the purpose of actual settlement and cultivation and that he would faithfully and honestly endeavor to comply with all the requirements of law as to said land and

the residence and cultivation necessary to acquire the title to said land so applied for and had not and did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for himself. That thereupon the said Jay C. Freem, then and there paid to the Receiver of the said local land office of the United States, at Helena, Montana, the sum of sixteen dollars, the same being the proper and legal fee then and there due and payable to the said Receiver upon the filing of said application aforesaid. That thereafter on the second day of July, A. D., 1902, and upon such payment having been made as aforesaid, a receipt was then and there issued and delivered by the said Receiver of the said Helena Land Office to the said Jay C. Freeman for said amount of money so paid by him as aforesaid, and attached to an connected with said receipt was and is a notation setting forth in detail the requirements of the law to be observed and complied with by the said Jay C. Freeman, in order to obtain title to said lands so applied for by him as aforesaid and to be entered by him, as follows, to-wit: "Note.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years of the expiration of the said five years, he must offer proof of his actual settlement and cultivation, failing to

do which, his entry will be cancelled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from the date of filing affidavit to the time of payment."

THIRD:

That thereupon, in order to entitle the said Jay C. Freeman to obtain and procure from the said United States a patent for said tract of land under the homestead laws of the United States, it was incumbent upon him, and he was required to make, actual settlement upon the said lands and reside thereon and cultivate the same for a period of five years from and after the time of the filing in said local land office at Helena, Montana, of his said application and affidavit hereinbefore set forth, or in case, he did not desire to remain upon said land the full period of five years to make payment for the said land at the expiration of fourteen months from and after the filing of said application and affidavit, upon making proof before the Register and Receiver of the said local land office of the United States, at Helena, Montana, of settlement upon and cultivation of said lands by the said Jay C. Freeman from the date of the filing of said application and affidavit down to the time of making such payment. That for the purpose of availing himself of the privilege afforded by law in such case made and provided, to purchase the said lands after the expiration of fourteen months from and after the date

of the filing by him of said application and affidavit, on or about the 19th day of June, A. D., 1902, as aforesaid, the said Jay C. Freeman, on the 18 day of August, 1904, appeared before J. M. Burlingame, then and there the Register of the United States Land Office at Great Falls, Montana, which said land office was then and there the proper local land office for making final proof upon said homestead entry hereinbefore mentioned, with his final proof witnesses, William S.? Kirkland and Richard T. Loss, and offered proof before the said Register and Receiver that he had settled upon said lands and premises and actually resided thereon and cultivated the same as required by, and within the meaning and intent of, the said homestead laws of the said United States; and then and there gave, made out and signed his deposition and swore to the same before the said J. M. Burlingame, Register of the United States Land Office as aforesaid, and at the same time filed and caused to be filed said affidavit and deposition and sworn statement, in the United States Land Office at Great Falls, Montana, said land office then and there being the proper United States Land office of the land district wherein the said lands are situated, and then and there offered, presented and delivered and filed said affidavit, deposition and sworn statement so made, signed and sworn to by the said Jay C. Freeman, to and with the Register and Receiver of the said United States Land Office, as proof of the settlement and residence upon and the cultivation

of the said lands and premises by the said Jay C. Freeman, as required by law and the statute in such case made and provided and the same were accepted by the said Register and Receiver of the said land office.

FOURTH.

And your orator showeth unto your honors that the said Jay C. Freeman, in the said affidavit and deposition and sworn statement, made, signed and sworn to by him, as aforesaid, and offered, presented, delivered to, and filed with, the said Register and Receiver, and accepted by them as proof of the settlement and residence of the said Jay C. Freeman upon said lands and of the cultivation of the same by the said Jay C. Freeman, among other matters and things, testified and deposed that he had actually resided upon said lands since July, 1902, and had resided on said lands continuously since July, 1902, except for a period of not to exceed three months in any one year, and each time the said Jay C. Freeman was absent, he had been away working for wages; that he had placed improvements on said land of the value of four hundred dollars and had constructed a wire fence around said property and had seeded ten acres of said land and had irrigated the same, and the said Jay C. Freeman procured from each of the said final proof witnesses, William S. Kirkland and Richard T. Loss, affidavits, depositions and sworn statements taken before the said J. M. Burlingame, as aforesaid, made, signed, and sworn to by the said final

proof witnesses before the said Register as aforesaid, to the same effect and corroborative and in aid of the said affidavit, deposition, and sworn statement, made, signed and sworn to by the said Jay C. Freeman, and filed the same, together with the said Jay C. Freeman's own affidavit, deposition, and sworn statement, in the local land office of the United States at Great Falls, Montana, and offered, presented, and delivered the same to the said Register and Receiver of the said land office, together with his own affidavit, deposition and sworn statement, as proof of the settlement and residence upon, and cultivation of, the said lands by the said Jay C. Freeman, as required by law, and all of the said affidavits, depositions, testimony, and sworn statements of the said Jay C. Freeman and his said final proof witnesses, so made, signed and sworn to, as aforesaid, and offered, presented and delivered to the said Register and Receiver of the said land office, as aforesaid, were, and each of them was, then and there taken and accepted by the said Register and Receiver of the said land office as proof of the settlement and residence of the said Jay C. Freeman upon the said premises. That on the said 23 day of August, 1904, the said Jay C. Freeman paid to the Receiver of the said United States Land Office at Great Falls, Montana, the sum of $200, being payment for said land at the rate of $1.25 per acre, and thereupon the said Receiver then and there issued to the said Jay C. Freeman, his final receipt No. 568 for the said moneys so paid to him by the said

Jay C. Freeman, in payment of said lands, as aforesaid, and the Register of the said land office likewise then and there issued to the said Jay C. Freeman, his certificate No. 568 for said lands, certifying that in pursuance of law the said Jay C. Freeman had purchased said lands, and upon presentation of said certificate to the Commissioner of the General Land Office, the said Jay C. Freeman should be entitled to receive a patent for said lands hereinbefore more particularly mentioned and described; that thereafter such proceedings were had that on the tenth day of February, A. D., 1905, a patent was issued by the said United States to the said Jay C. Freeman for the said lands, which patent was duly delivered to the said Jay C. Freeman and received by him.

FIFTH:

And your orator further showeth unto your honors that the said acceptance of the said affidavits, depositions and testimony of the said Jay C. Freeman, and of his final proof witnesses, William S. Kirkland and Richard T. Loss, as proof of the settlement and residence of the said Jay C. Freeman upon said lands and the cultivation of the same by him, as required by law, by the said Register and Receiver, and the issuance by the said Receiver of the said final receipt and the issuance of the said certificate of purchase by the said Register, as hereinabove mentioned and set forth, and the issuance of the said patent for the said tract of land by the United States, were had and done by the said of-

ficers of the said land office and the officers of your orator, the United States, in reliance by them and each of them upon the truth of the testimony and statements contained in the affidavits and depositions of said Jay C. Freeman, and in reliance by them and each of them upon the truth of the testimony and statements contained in the affidavits and depositions of said final proof witnesses, William S. Kirkland and Richard T. Loss, and in reliance upon the good faith of the said Jay C. Freeman and his final proof witnesses in the premises, and not otherwise.

SIXTH:

That the said affidavit and deposition of the said Jay C. Freeman, and the affidavits and depositions of the said final proof witnesses, William S. Kirkland and Richard T. Loss, were, and each of them was, then and there false, fraudulent and untrue, as was then and there well known to the said Jay C. Freeman, and to each of his said final proof witnesses, and made with intent to deceive the officers of the United States and with intent to fraudulently obtain patent to the said land hereinabove described and by fraud and deceit to procure a patent for the said lands by means of false and fraudulent testimony and statements made and contained in the said affidavits, depositions and testimony, in this, to-wit: That the said Jay C. Freeman had not and did not establish residence upon said lands or any portion thereof during the month of July, 1902, or at any time, or at all; that the said Jay C. Free-

man had not at the time of making his said proof and the filing of the same in the said land office, resided on said lands or any part or portion thereof, continuously, or in any other manner, or at all, since the month of July, 1902, or at any other time, and had not then, or at any other time, built a frame house sixteen by eighteen feet, with a shingle roof, and that the said Jay C. Freeman had not enclosed said lands with a three-wire fence, and that the said Jay C. Freeman had not, at the time of the filing of the said depositions and statements, sowed ten acres of said lands in grasses or grass seed, or that any part or portion of said lands had at any time been irrigated by the said Jay C. Freeman, and that the said Jay C. Freeman did not then and there, or at any other time, have improvements upon the said land of the value of four hundred dollars, or any other value or amount whatsoever. That your orator alleges the fact to be that the said Jay C. Freeman never did make a settlement upon said lands, or any part thereof, and did not establish his residence upon said lands, or any part thereof, and never did cultivate any part or portion thereof, and had no improvements thereon, and that each and every of the statements so made by the said Jay C. Freeman and his said final proof witnesses, as hereinbefore specifically mentioned and set forth, and which are contained in the said affidavits, depositions and testimony to prove settlement and residence by the said Jay C. Freeman upon said lands and the cultivation by the said Jay C. Free-

man of the same, as required by the homestead laws of the United States, are utterly false and fraudulent and untrue, in every particular, as he, the said Jay C. Freeman, then and there well knew.

SEVENTH:

And your orator further charges and alleges that the said testimony of the said Jay C. Freeman, as contained in said affidavit and deposition of said Jay C. Freeman, and the testimony of the said final proof witnesses, William S. Kirkland and Richard T. Loss, as contained in said affidavits and depositions, made by them, as aforesaid, was false, fraudulent and untrue in the respects and in the several particulars as hereinbefore set forth, and the same were made, offered, presented and filed as proof of the settlement and residence of the said Jay C. Freeman, upon the said lands and the cultivation of the same, as aforesaid, for the false and fraudulent purpose of imposing upon and deceiving the Register and Receiver of the said United States Land Office at Great Falls, Montana, and to cause and induce the said officers and agents of your orator to believe that the said testimony contained in said affidavits and depositions were true, and that the said Jay C. Freeman, had, in fact, made and established a settlement and resided upon said tract of land and had cultivated the same as by law required, for the purpose of obtaining and procuring by means of fraud and deceit the issuance to said Jay C. Freeman, of a patent of the United States for the said lands hereinbefore described.

EIGHTH:

And your orator further showeth unto your honors that the said Jay C. Freeman, by means of the said false and fraudulent depositions and the false and fraudulent statements and testimony therein contained, given under the sanction and oath of the said Jay C. Freeman, and his said witnesses, imposed upon and deceived the said officers and agents of the said United States and caused and induced the said officers to believe that the testimony and statements contained in said depositions were true, and that the said Jay C. Freeman had actually settled and resided upon said lands and cultivated the same in the manner and to the extent as stated in said depositions, and that the said officers of your orator, the United States, supposing and believing the said testimony and statements contained in said depositions of said Jay C. Freeman and his said final proof witnesses, to be true, and relying upon the truth of the said testimony and statements, so falsely and fraudulently given and made by the said Jay C. Freeman and his said final proof witnesses, as aforesaid, and believing and supposing, on the strength of said depositions and testimony that the said Jay C. Freeman had actually made settlement and established his residence upon said land and had cultivated the same in the manner and for and during the period of time as therein stated by him, the said Jay C. Freeman, and his said final proof witnesses, William S. Kirkland and Richard T. Loss, were wholly deceived and misled into allow-

ing said proof to be filed and accepted and in permitting the issuance of said final receipt and the issuance of said certificate of purchase of said land and of the United States Patent therefor by the said officers of the United States, as hereinbefore set forth, and delivering the said patent to the said Jay C. Freeman.

NINTH:

And your orator further showeth unto your honors that since the issuance of said final receipt and certificate and patent for said lands to the said Jay C. Freeman, the said Jay C. Freeman has heretofore, on the 18 day of August, 1904, deeded the said lands to the said defendant, Frank D. Cooper, and that the said Frank D. Cooper is now in the occupancy, possession and enjoyment of the said lands and premises, but your orator alleges that by whatever pretended right or title the said Frank D. Cooper now holds possession of or occupies said land, the same is wholly void and ineffectual as against the rights of your orator; that the existance of said patent so fraudulently obtained and procured by the said Jay C. Freeman, as hereinbefore set forth, on its face entitled the said Jay C. Freeman, and those claiming under him, to exercise the right of absolute ownership on and over the said lands, and assert a legal title to the same, to which the defendant is not entitled; that if the said patent remains uncancelled and in force, the same may be used in fraud of your orator and all persons relying thereon, as a valid and substantial conveyance of the

legal title to said lands and premises.

TENTH:

And your orator further avers and charges that the said defendant, Frank D. Cooper, was not a purchaser in good faith and for a valid consideration of the lands herein involved; but if he purchased at all, purchased the same with full and complete knowledge that they were entered in fraud and in violation of the laws of the United States by his said pretended grantor, Jay C. Freeman, against the legal and equitable rights of the complainant; that said pretended purchase is void and should be so decreed in equity in favor of this complainant and against the said defendant, Frank D. Cooper.

ELEVENTH:

And your orator further showeth unto your honors that on or about the 13th day of December, 1909, the said defendant Frank D. Cooper and his wife, Alice G. Cooper executed and delivered to the defendant George Heaton their contract in writing by which they agreed and bound themselves to convey to the said defendant George Heaton all of their rights, title and interest in and to the lands herein first above described; and your orator further showeth that the said defendant George Heaton by reason of the execution of said contract now claims some right, title and interest in and to said lands adverse to the rights of the complainant therein, but your orator alleges that whatever interest the said George Heaton now claims to have in said lands was

received and accepted by him with full knowledge of the fraud so perpetrated upon this complainant in the procurement of said patent, and that he is not a bona fide purchaser for value without notice of said fraud, and in equity and good conscience said contract, insofar as it affects the lands herein involved, should be cancelled and held for naught.

All of which actions, doings, and pretenses of the defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of this complainant in the premises.

IN CONSIDERATION WHEREOF, and for as much as the complainant is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, and,

TO THE END, THEREFORE, that the said defendants, Frank D. Cooper and George Heaton, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged but not under oath (an answer under oath being hereby expressly waived) as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated; and to the end that the said defendants and all and singular their agents, employes, and servants may be forthwith and forever restrained and enjoined from setting up and asserting or claiming any rights, privileges, benefits, or advantages under and by reason

of said patent or said pretended deed of conveyance, or said agreement to sell said lands, herein before mentioned; and to the end that said patent so issued by the complainant to the said Jay C. Freeman may be declared void and cancelled; and that said pretended deed of conveyance from the said Jay C. Freeman to the defendant, Frank D. Cooper, may be, by decree of this Honorable Court, treated as a cloud upon the title of complainant to all and singular the lands at Paragraph I herein described, and the same removed as such; and that said agreement so entered into between the defendant Frank D. Cooper and his wife and the defendant George Heaton, insofar as the same affects the title to the lands herein involved, be cancelled and held for naught; And that the legal and equitable title thereto and the right of possession thereof be restored and given to complainant; and that the complainant have such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience.

May it please your Honors to grant unto the complainant the Writ of Subpoena to be directed to the said Frank D. Cooper, and George Heaton, thereby commanding him at a certain time and under a certain penalty, therein to be specified, personally to be and to appear before this Honorable Court, and then and there to answer all and singular the prem-

ises, and to stand to and abide such further order, direction or decree therein as to this Honorable Court may seem meet.

(Signed) GEORGE W. WICKERSHAM,
Attorney-General of the United States.
JAS. W. FREEMAN,
United States Attorney, District of Montana.

UNITED STATES OF AMERICA,
District of Montana,—ss.

JAMES W. FREEMAN, being first duly sworn, deposes and says that he is the regularly appointed, qualified, and acting United States Attorney for the District of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated and alleged are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN.

Subscribed and sworn to before me this 7 day of December, 1909.

GEO. W. SPROULE,
Clerk U. S. Circuit Court, District of Montana.

NOTE BY CLERK:

The parts underscored are amendments to the original bill, allowed by the Court under order of May 23rd, 1912, hereinafter set forth.)

(Endorsed: Filed December 7, 1909, Geo. W. Sproule, Clerk.)

Thereafter, on December 7, 1909, subpoena in equity was duly issued herein as follows, to-wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

TO THE PRESIDENT OF THE UNITED STATES OF AMERICA, GREETING:

TO,

FRANK D. COOPER, Defendant:

YOU ARE HEREBY COMMANDED, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room in FEDERAL BUILDING, HELENA, MONTANA, on the 3rd day of JANUARY, A. D., 1910 to answer a Bill of Complaint exhibited against you in said Court by THE UNITED STATES OF AMERICA, Complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS: The Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 7th day of Dec., in the year our Lord one thousand nine hundred and nine and of our Independence the 134.

GEO. W. SPROULE,
Clerk.

By....., Deputy Clerk.

Memorandum, pursuant to Rule 12, Supreme Court, U. S.

YOU ARE HEREBY REQUIRED to enter your

appearance in the above suit, on or before the first Monday of January next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

GEO. W. SPROULE, Clerk.

Geo. W. Wickersham, U. S. Atty. Gen.,
Washington, D. C., J. W. Freeman,
U. S. Atty., Solicitor for Complainant.
Helena, Montana.

(Service of within subpoena accepted by James A. Walsh, attorney for defendant, December 18, 1909.)

(Endorsed, filed, December 20th, 1909, Geo. W. Sproule, Clerk.)

Thereafter, on March 29, 1910, defendant Cooper filed his answer herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

ANSWER TO BILL OF COMPLAINT.

This defendant, now and at all times hereinafter, saving to himself, all, and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections, in the said Bill of Complaint contained, for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for him to make answer to, answering says:

I.

Admits that complainant was on the nineteenth day of June, 1902, the owner of said lands mentioned and described in the complaint, and that Jay

C. Freeman made and filed in the local land office his application to enter said lands as a homestead.

II.

Admits that the said Jay C. Freeman filed an affidavit in the local land office, setting forth the matters and things required by law to be set forth in such cases made and provided; and that he paid the legal fee, required and that the Receiver of said land office issued to him a receipt in the form required by law.

III.

Admits that it was incumbent upon said Jay C. Freeman to comply with the law, as to residence and cultivation upon said land to acquire the title thereto.

IV.

Admits that on or about the 18th of August, 1904, the said Jay C. Freeman offered proof of his settlement and residence upon said lands, and presented affidavit in compliance with the law, showing the matters and things necessary to acquire title thereto.

V.

Admits that said Jay C. Freeman presented a sworn statement that he had actually settled upon said land and resided thereon since July, 1902, within the meaning and intent of the homestead laws, and placed improvements upon said land to the value of Four Hundred Dollars, and constructed a frame house sixteen by eighteen, and had constructed a wire fence around said land, and had seeded ten acres of said land and irrigated the same; and

that said affidavit was also corroborated by the affidavits of William S. Kirland and Richard T. Loss; and that said proof was accepted by the Register and Receiver of said land office, and that said officers issued to him a certificate thereof, as provided by law, which entitled said Jay C. Freeman to receive a patent for said land; and thereafter such proceedings were had that on the 10th day of February, 1905, a patent was issued and delivered for said land, and denies all other matters and things contained in paragraph Three of the Bill of Complaint.

VI.

That whether or not the said officer of said land office accepted or relied upon said affidavits of saud Jay C. Freeman, William S. Kirkland and Richard T. Loss, or relied upon any reports made by the special agents of the Land Department, this defendant denies that he had any knowledge or information thereof sufficient to form a belief; but denies that the affidavits or depositions of said Jay C. Freeman, William S. Kirkland, or Richard T. Loss were false, fraudulent or untrue, or that the matters and things stated in said affidavits were known to be false, fraudulent or untrue by the said Jay C. Freeman, William S. Kirkland or Richard T. Loss, or that said affidavits were made with intent to defraud said land office; or to procure patent by means of false or fraudulent testimony made or contained in said affidavits; denies that the said Jay C. Freeman had not established his resi-

dence upon said land, or that he had not resided upon the same, or that he had not built a house thereon of the size and dimensions stated, or that he had not enclosed the land with a wire fence to the extent stated in said affidavit, or that he had not seeded ten acres of said land and irrigated the same; and denies that the matters and things set forth in the depositions of said Jay C. Freeman, William S. Kirkland or Richard T. Loss were, or are, false or untrue; and denies each and every other allegation in paragraphs four, five and six of the Bill of Complaint.

VII.

Denies that the matters and things set forth in the affidavits and depositions of the said Jay C. Freeman, William S. Kirkland or Richard T. Loss were false, fraudulent or untrue, in respect to the several, or any of the matters therein stated, or that the same was offered or presented for the purpose of deceiving the Register and Receiver of the said land office, or to defraud the United States of the said lands; and denies each and every other allegation in Paragraph seven in the Bill of Complaint contained.

VIII.

Admits that some time after the issuance of said final receipt, the said Jay C. Freeman deeded and conveyed the said lands to this defendant, and that this defendant is now the owner and in possession thereof; but denies that the right and title of this defendant in and to said lands is wholly, in any

manner, or at all void, or ineffectual, as against the right of the complainant; and denies that the said patent was fraudulently obtained.

IX.

Admits that said patent on its face entitled the said Jay C. Freeman and those claiming under him to exercise the right of absolute dominion and ownership over said lands and assert legal title to the same; But denies that this defendant is not entitled to assert ownership and legal title to said premises, and denies said patent is, or can be used in fraud of any rights of the complainant; and denies each and every other allegation in paragraph nine of the Bill of Complaint.

X.

Denies that this defendant is not a purchaser in good faith, for a valuable consideration of the lands and premises described in the complaint; and denies that he purchased the same with full, complete or any knowledge that they were entered in fraud or in violation of the laws of the United States by said Jay C. Freeman; and denies that the said purchase is void, or that it should be so decreed, and denies that said premises were entered, or patent procured in fraud or violation of the laws of the United States.

XI.

And defendant avers that he purchased said lands in good faith and paid a valuable consideration therefor, and at the time he purchased said lands he believed and now believes that the said Jay C.

Freeman entered said lands and procured title thereto in good faith, and had in all things complied with the laws of the United States; and defendant avers that he did not have any notice or knowledge that the said Jay C. Freeman had not, or that the complainant herein claimed that he had not, in all things and in good faith complied with the laws of the United States, with reference to settling, residing upon and acquiring title to said land.

XII.

And defendant further avers that all the acts and deeds of the said Jay C. Freeman, with reference to establishing residence, residing upon and making improvements upon said land were such that the complainant herein could, with ordinary diligence, through its officers and agents, who were the employed in the business, and before the final proof was made, or certificate issued, have ascertained whether or not the said Jay C. Freeman had in all things complied with the law, with reference to settlement, residence, cultivation and improvements on said land necessary to acquire title thereto; and if any matters or things stated in said affidavits or depositions of said Jay C. Freeman or said witnesses were not true, the officers of said land office could have refused to accept final proof and to issue certificate therefor, or patent for said lands, and that complainant by reason of the negligence and laches of its officers is now estopped from asserting any right, title, claim or interest in or to said lands against this defendant.

XIII.

And defendant avers that since he purchased said land, and before the commencement of this suit, he in good faith entered into a contract with George Heaton, and in good faith sold said land to said Heaton for a valuable consideration, and said Heaton in good faith and for a valuable consideration, and without any notice of the claim of the complainant herein to said land, or any claim that the said Freeman had not in all things complied with the law in obtaining title to said land, and without any knowledge of any wrong doing, or a claim of wrong doing on the part of the said Jay C. Freeman, purchased the said lands from this defendant.

XIV.

And this defendant denies all and all maner of unlawful combination, confederacy and wrong doing wherewith he is by the said Bill charged, without this, that there is any other matter, cause or thing in said complainant's Bill of Complaint contained, material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to the best of the knowledge of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JAMES A. WALSH,

Solicitor for Defendant.

Service of the foregoing admitted and copy received this 29 day of March, 1910.

J. W. FREEMAN,
United States Attorney.

(Endorsed Filed March 29, 1910, Geo. W. Sproule, Clerk.)

Thereafter, on March 30, 1910, Replication was filed therein as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

REPLICATION.

This Replicant, saving and reserving to itself all and all manner of advantage of exception which may be had an taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant without that that any other matter or thing in said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct and humbly as in and by its said bill, it has already prayed.

JAS. W. FREEMAN,
United States Attorney.

(Service accepted March 30, 1910, James A. Walsh, Solicitor for Deft.)

(Endorsed, Filed March 30, 1910, Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.)

Thereafter, on May 23, 1912, an order allowing amendments was duly made and entered herein, as follows, to-wit:

In the District Court of the United States in and for the District of Montana.

Nos. 946, 947 and 948, United States vs. Frank D. Cooper.

These causes, heretofore submitted to the Court, came on regularly at this time for the decision of the court; whereupon it is ordered that the complainant be allowed to amend its bill of complaint in each of the above entitled causes by adding the name of George Heaton as party defendant, by interlineation as far as feasible, and by attaching a separate paragraph to properly state the case as to him, and thereupon complainant may have other subpoenas issued and proceed to service thereof upon Heaton.

Thereafter the actions may proceed as the parties are advised.

Entered, in open court, May 23, 1912.

GEO. W. SPROULE, Clerk.

Thereafter, on June 19, 1912, Notice and Amendments were filed herein, being as follows: to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

NOTICE AND AMENDMENTS.

TO J. A. WALSH, ESQ., Attorney for the above named defendant, and FRANK D. COOPER, Defendant in the above entitled action:

You and each of you will please take notice that the complainant in the above entitled action did on the 14th day of June, 1912, amend its bill of complaint in accordance with an order of the Honorable George M. Bourquin filed and entered on May 23, 1912, by then and there making the following interlineations and insertions:

1. Page 1, lines 7 and 8, by adding "and George Heaton."

2. Page 1, line 8 by adding the letter "s" to the word defendant.

3. Page 1, line 16, after the word "Montana", by adding "and George Heaton, a resident of the Southern District of the State of Iowa."

4. Page 13, between lines 21 and 22, by inserting Paragraph eleven which is as follows:

"ELEVENTH"

And your orator further showeth unto your honors that on or about the 13th day of December, 1909, the said defendant, Frank D. Cooper and his wife Alice G. Cooper executed and delivered to the defendant George Heaton their contract in writing by which they agreed and bound themselves to convey to the said defendant George Heaton all of their

right, title and interest in and to the said lands herein first above described; and your orator further showeth that the said defendant George Heaton by reason of the execution of said contract now claims some right, title and interest in and to the said lands adverse to the rights of the complainant therein, but your orator alleges that whatever interest the said George Heaton now claims to have in said lands was received and accepted by him with full knowledge of the fraud so perpetrated upon this complainant in the procurement of said patent, and that he is not a bona fide purchaser for value without notice of fraud, and in equity and good conscience said contract, insofar as it affects the lands herein involved, should be cancelled and held for naught."

5. Page 13, line 23, by adding the letter "s" to the word "defendant."

6. Page 13, line 31, by adding the letter "s" to the word 'defendant".

7. Page 13, line 32, by adding "and George Heaton."

8. Page 14, line 5, by striking out the word "he", and inserting in lieu thereof the word "they."

9. Page 14, line 6, by adding the letter "s" to the word "defendant."

10. Page 14, line 7, by striking out the word "his" and inserting in lieu thereof the word "their".

11. Page 14, line 11, by inserting after the word "conveyance" the following, "or said agreement to sell said lands, hereinbefore mentioned."

12. Page 14, line 19, after the word "such" by

inserting, "and that said agreement so entered into between the defendant Frank D. Cooper and his wife and the defendant George Heaton, insofar as the same affects the title to the lands herein involved, be cancelled and held for naught."

13. Page 14, line 29, by adding "and George Heaton."

All of which will more fully appear from the original bill of complaint on file in the office of the Clerk of the United States District Court, District of Montana, to which reference is hereby made.

Dated this 19th day of June, 1912.

EDWARD A. LaBOSSIERE,
Assistant U. S. Attorney.

Due service of the within notice acknowledged and true copy thereof received this 19th day of June, 1912.

JAMES A. WALSH,
Attorney for defendant.

(Endorsed filed, June 19, 1912. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.)

Thereafter, on Sept. 17, 1912, an Order was duly entered herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

ORDER.

It having been made to appear in the above entitled action that the defendant George Heaton is not a resident of and within the state and district of Montana, but that the said defendant is a resident

and inhabitant of St. Paul, in the district of Minnesota, and that personal service of process of this court cannot be had or obtained upon said aforementioned defendant within the district of Montana, and application having been made to this Court pursuant to Section No. 8, of the Act of March, 3, 1875, for an order of this court requiring and directing the said defendant to appear, plead, answer or demur to said complainant's bill of complaint on file herein by a day certain to be fixed and designated by this court;

Now, therefore, it is ORDERED that said application, be, and the same is, hereby granted, and you, the said George Heaton, one of the defendants in the above entitled cause, are hereby ordered and required and directed to be and appear in the district court of the United States, District of Montana, in the City of Helena, in the district of Montana, on the 4th day of November, 1912, and then and there to plead, answer or demur to complainant's bill of complaint exhibited against you in said court by the said complainant, the United States of America, to which said bill of complaint you are hereby referred, and to receive what said court shall have considered in that behalf.

Dated this 17th day of September, 1912.

FRANK S. DIETRICH,

Judge.

(Endorsed: Entered Sept. 17, 1912, Geo. W. Sproule, Clerk, By Harry Dunn, Deputy. Filed October 2nd, 1912, Geo. W. Sproule, Clerk, by C. R.

Garlow, Deputy.)

RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA,

District of Minnesota,—ss.

I hereby certify and return that I served the annexed Order on the therein-named George Heaton by handing to and leaving a true and correct copy thereof with him, personally at St. Paul, in said District on the day of September, A. D. 1912.

WILLIAM N. GRIMSHAW,

U. S. Marshall.

By GEO. W. WELLS, Deputy.

Thereafter, on Dec. 2, 1912, the Answer of defendant Heaton was filed herein, being as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

IN EQUITY.

SEPARATE ANSWER OF DEFENDANT GEORGE HEATON.

The answer of George Heaton, one of the defendants to the bill of complain as amended of the above named complainant:

This defendant, now and at all times hereinafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

1. This defendant admits the allegations contained in paragraphs numbered First to Fifth, both inclusive, of complainant's bill of complaint as amended.

2. This defendant has no knowledge or information as to the truth or falsity of any of the allegations contained in paragraphs numbered Sixth, Seventh and Eight of said bill of complaint as amended, and can not set forth at to his belief or otherwise, whether or not any of said allegations are true, and calls for proof thereof.

3. This defendant has no knowledge or information as to the truth of falsity of any of the allegations contained in paragraph Numbered Ninth of said bill of complaint as amended, and cannot set forth as to his belief or otherwise whether or not any of said allegations are true, and calls for proof thereof, except that this defendant admits that the said J. C. Freeman, on the 18th day of August, 1904, deeded the lands mentioned and described in paragraph numbered First of the said bill of complaint as amended, to the said defendant Frank D. Cooper; but this answering defendant says that the said Frank D. Cooper is not now in the occupancy, possession and enjoyment, or either thereof, of said lands and premises; but that this defendant was in the occupancy, possession and enjoyment of said lands from the 1st day of August, 1910, until the 22nd day of April, 1911, under and by virtue of a contract for the sale of said lands executed and delivered to this defendant on the 13th day of De-

cember, 1909, by said Frank D. Cooper and Alice G. Cooper, his wife; and that ever since the 22nd day of April, 1911, the said lands have and still are in the occupancy, possession and enjoyment of the Great Falls Farm Land Company, a Montana corporation, under and by virtue of an assignment of the contract above mentioned, executed and delivered to the said Great Falls Farm Land Company by this defendant on the said 22nd day of April, 1911; and that the right or title by which this said defendant so held possession and occupied said lands was, and the right to title by which said Great Falls Farm Land Company now holds possession and occupies said lands is, valid and effectual as against the rights of complainant; and that this defendant was, from the 1st day of August, 1910, until the 22nd day of April, 1911, and the said Great Falls Farm Land Company now is entitled to exercise the right of absolute ownership on and over said lands, and to assert a legal title to the same; and that this defendant does not believe that, if the said patent remains uncancelled and in force, the same may be used in fraud of the complainant and all persons relying thereon, as a valid and substantial conveyance of the legal title to said lands and premises.

4. That this defendant has no knowledge or information as to the truth or falsity of any of the allegations contained in paragraph numbered Tenth of said bill of complaint as amended, and cannot set forth as to his belief or otherwise, whether or

not any of said allegations are true, and calls for proof thereof, except that this defendant does not believe that the said defendant Frank D. Cooper was not a purchaser in good faith and for a valid consideration of the lands, herein invilved; and does not believe that the said defendant Frank D. Cooper purchased the said lands with full and complete knowledge, or any knowledge at all, that they were entered in fraud or in violation of the laws of the United States by the said J. C. Freeman, against the legal and equitable rights of the complainant; and does not believe that said purchase by said defendant Frank D. Cooper is void and should be so decreed in equity in favor of said complainant and against the said defendant Frank D. Cooper, or against this defendant or his successors in interest.

5. This defendant has no knowledge or information as to the truth or falsity of any of the allegations contained in paragraph numbered Eleventh of said bill of complaint as amended, and cannot set forth as to his belief or otherwise, whether or not any of the said allegations are true, and calls for proof thereof, except that this defendant admits that on or about the 13th day of December, 1909, the said defendant Frank D. Cooper and his wife, Alice G. Cooper, executed and delivered to this defendant their contract by which they agreed and bound themselves yo convey to this defendant all of their rights, title and interest in and to the lands herein involved; and this defendant says that he procured the execution and delivery of said contract

in good faith and for a valuable consideration; and the he, by reason of the execution and delivery of said contract, had, from the 1st day of August, 1910, until the 22nd day of April, 1911, and that the said Great Falls Farm Land Company had, ever since the said 22nd day of April, 1911 and now has, the right of absolute ownership over, in and to said lands; and that the interest heretofore asserted and claimed by this defendant in said lands was acquired by him under the contract hereinabove referred to, and without any knowledge of any fraud in any maner perpetrated upon said complainant in the procurement of the said patent; and that this defendant was a bona fide purchaser for value without notice of any fraud; and that this defendant does not believe that, in equity and good conscience, said contract, in so far as it affects the lands herein involved, should be cancelled and held for naught.

6. For further answer and defense to the said bill of complaint as amended, this answering defendant avers and says: That on the 13th day of December, 1909, this defendant made and entered into a contract in writing with said defendant Frank D. Cooper and Alice G. Cooper, his wife, wherein and whereby said Frank D. Cooper and Alice G. Cooper, his wife, sold and agreed to convey, in fee simple by warranty deed, to this defendant, the southeast quarter of the southwest quarter of section eight (8), the east half of the northwest quarter and the southwest quarter of the northwest quarter of section seventeen (17), township nineteen

(19) north of range three (3) west of the Montana principal meridian, containing one hundred and sixty (160) acres, situate, lying and being in the County of Cascade, State and District of Montana, together with other lands situate in the counties of Cascade and Lewis and Clark in said State and District of Montana; that in and by the said contract this defendant agreed and bound himself to pay to the said Frank D. Cooper and Alice G. Cooper, his wife, the sum of five and 70/100 Dollars ($5.70) per acre for all of said lands mentioned in said contract, including the lands herein involved, in certain specified installments, which sum was the full vlaue of the lands and premises by said contract agreed to be conveyed; that this defendant and his successor in interest under said contract, the said Great Falls Farm Land Company, have fully paid all the installments due under said contract up to this time, and are legally bound to pay the balance thereof; that, under the terms and provisions of said contract, possession of the lands herein involved was given to this defendant on the 1st day of August, 1910, and that upon said date this defendant entered into the occupancy, possession and enjoyment of said lands. And this defendant further says that he did not, at the time of the execution of the contract hereinbefore mentioned, or at any other time, have any knowledge, information or notice of any fraud or improper conduct in reference to procuring a patent to said lands; that under the terms and provisions of said contract, and by virtue of the full perform-

ance on the part of this defendant of all the covenants therein contained by him to be kept and performed, up to the 22nd day of April, 1911, this defendant became and was a bona fide purchaser of said lands for a valuable consideration.

And this defendant further says that he did, on the 22nd day of April, 1911, for a valuable consideration, sell, assign, transfer and set over to the Great Falls Land Company, a Montana corporation, the above mentioned contract and all of his right, title and interest therein and thereunder.

7. And this defendant, in addition to the foregoing answer avers that the cause of action, if any there may be arising to the complainant on account or by reason of the several allegations and complaints in its said bill contained, did not accrue within six years before the said bill was filed and subpoena thereunder served upon this defendant; and this allegation defendant makes in bar of the complainant's bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

WHEREFORE, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint as amended material to be answered, according to his best knowledge and belief, humbly prays this honorable court to enter its decree that this defendant be dismissed with his reasonable costs and charges in his behalf most wrongfully sustained, and for such other and further relief in the premises as to

this honorable court may seem meet and in accordance with equity.

GEORGE HEATON.
By E. C. DAY,
His Solicitor.

DAY & MAPES,
Solicitors and of counsel for
the defendant George Heaton.

Helena, Montana, Dec. 1, 1912.

(Endorsed: Filed December 2nd, 1912, Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy.)

Thereafter, on Dec. 23, 1912, Replication was filed herein as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

REPLICATION TO SEPARATE ANSWER OF GEORGE HEATON.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, and for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or

avoided, traversed, or denied is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

J. W. FREEMAN,
United State Attorney
District of Montana.

Due service of the within replication acknowledged and true copy thereof received this 23rd day of December, 1912. Day & Mapes, Attorneys for Defendants.

(Endorsed: Filed Dec. 23, 1912, Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy.)

Thereafter, on January 28th, 1914, Decree was filed and entered herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

DECREE.

This cause came on to be heard at this term, to-wit, on the 15th day of January, 1914, upon the pleadings and the proof, and was argued by counsel, and

It appearing to the court that a bill in equity was filed in this court on the 7th day of December, 1909, against the defendant, Frank D. Cooper, and that subpoena was duly issued; that thereafter said defendant filed his answer to said bill of complaint, and

It further appearing that by an order of this

court made on the 23rd day of May, 1912, the said George Heaton was made a party to said suit; that notice was duly issued and served upon said defendant, George Heaton, and that thereafter, on the 2nd day of December, 1912, said George Heaton filed his answer herein, and

It further appearing, and the court finds, that the patent to the following described land, to-wit: The southeast quarter of the southwest Quarter of Section Eight (8) the east half of the northwest quarter and the southwest quarter of the northwest quarter of section seventeen (17), township nineteen (19) north, range three (3) west, containing one hundred and sixty (160) acres, situate, lying and being in the county of Cascade, state and district of Montana, was fraudulently procured by Jay C. Freeman; that the said Frank D. Cooper is not and was not a bona fide purchaser of said land for value without notice of the fraud perpetrated upon complainant, and,

It further appearing that by the terms of a certain contract in writing date December 13, 1910, the said defendant, Frank D. Cooper, agreed to sell, and the said defendant, George Heaton, agreed to buy, said lands, the purchase price thereof to be paid in installments covering some six years, and upon payment in full said Frank D. Cooper is to convey said land by warranty deed to said defendant, George Heaton; that more than six years has expired from the date of the issuance of said patent to the date of service of notice upon said George Heaton, and that

the cancellation of said patent has became impracticable since said suit has been brought, and

It further appearing that the value of said land, at the date of the execution of said contract, was five and 70/100 dollars ($5.70) per acre, and that complainant is entitled to the value thereof, and the court being fully advised in the premises;

IT IS ORDERED, ADJUDGED and DECREED that the said complainant, the United States of America, do have and recover of and from the said defendant, Frank D. Cooper, the sum of Nine hundred twelve dollars ($912), with interest thereon at the rate of eight per cent per annu, from the 13th day of December, 1909, amounting to three hundred and 96/100 dollars ($300.96), making a total of twelve hundred twelve and 96/100 dollars ($1212.96), together with its costs incurred herein taxed at ....., and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that unless said amount is paid by the defendant, Frank D. Cooper, the said defendant, George Heaton, shall pay the same to complainant from the unpaid purchase money owing by the said George Heaton to the said defendant, Frank D. Cooper, upon his said contract of purchase of said lands, when said George Heaton was made a party thereto and appeared herein, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that such payment, if made by the said defendant, George Heaton, shall discharge said

purchase price to the extent thereof, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that complainant have a lien for the sum of twelve hundred twelve and 96/100 dollars ($1212.96), and its costs herein incurred taxed in the amount of.....upon the above described land as security and foreclosure thereof.

GEO. M. BOURQUIN,
Judge.

(Endorsed: Filed January 28, 1914. Geo. W. Sproule, Clerk.)

WHEREUPON, said pleadings, process and final degree are entered of final record herein, in accordance with the law and the practice of this court.

WITNESS my hand and the seal of said court at Helena, Montana, this 28th day of January, A. D. 1914.

(SEAL) GEO. W. SPROULE,
By C. R. Garlow,
Deputy Clerk.

(Endorsed: Filed, January 28th, 1914. Geo. W. Sproule, Clerk, By: C. R. Garlow, Deputy Clerk.)

BE IT REMEMBERED That this cause came on for hearing on the 30th day of June, 1910, before Hon. O. T. Crane, Standing Examiner in Chancery, at Helena, Montana, and the following proceedings had:

Edgar S. Foley, being duly sworn, and interro-

gated by Mr. Skinner, counsel for plaintiff, testified as follows:

"My name is Edgar S. Foley. I am 39 years of age; reside at Helena, Montana; occupation, Special Agent of the General Land Office. Have occupied that position for six years, and during all that time was in Montana. Prior to that I was stock breeding and ranching in North Dakota; went into that business about the year 1888. I made an examniation of the J. C. Freeman entry, described as follows: the southeast quarter of the southwest quarter of section eight (8) and the east half of the northwest quarter, and the southwest quarter of the northwest quarter of Section seventeen (17), township nineteen (19) north, range three (3) West. I made the examination about the 16th of September, 1906. I was instructed to do so by our Chief of Division, or Special Agent in charge. I had occasion to examine almost all of the land comprised within the limits of Township 19, north of Range 3 West, and in so doing I identified a great many section corners, and identified this land by means of known corners along fences, which was part of an enclosure that this entry lay in. The improvements I found at the time I made this examination were, a frame cabin about 12x16 with a shingle roof; there was no window in the cabin; no stove-pipe hole; a door frame but no door. There were no other improvements in the way of cultivation or plowing. I found that the door frame was absolutely untouched, or unmarred by screws or nails or hinges, or anything of that

nature. It had never been used. I did not have any talk with Mr. Freeman at that time. I was told that he was not in the country. This land is within the enclousure of Mr. Cooper. Mr. Cooper lived in the township east of this township, and about seven miles east I should judge. It was not fenced on the line, or cross fenced, but was embraced within the Cooper enclosure. There was no fence on the entry proper, except that it was intersected by a piece of fence, but the enclosure as a whole was not included in a fence, that is, the lines of the entry were not bounded by a fence. I did not look for any evidence of an irrigation ditch on a homestead entry because it was immaterial. Since I have been in Montana my business as a Special Agent has been examining all classes of entries under the Federal Land Laws.

CROSS-EXAMINATION BY MR. JAMES A. WALSH:

I lived in North Dakota since 1878; on the Little Missouri River and on the Big Missouri River. I never took up any government land myself. Mr. Kinsey pointed out this land to me. He was instrumental in bringing this case to the attention of the Department. He met me when I went to examine the land. I had made arrangements to meet him, and I stopped at his place wheile out there. I can't say whether he or his son Frank was with me. I cannot say whether I had their team or not. I was over these lands a number of different times; sometimes I would use Mr. Kinsey's team, and sometimes

I would use a Cascade team. I am not sure at this time whether I had his team or not. I might have had. I cannot say on what portion of the land the cabin was. It was right close to the outer edge of the Cooper enclosure, and at that point, I think it was on a section line. I know almost every corner in that township. I had to know them. I recognize the corners by the way they are now marked; the sections are marked on the west and east sides. A section corner on a township line running north and south is marked on the north and south sides, indicating so many miles on the north and south sides of the township corners, and on the east and west side of the township line, they are marked on the east and west sides of the township lines, they are marked on the east and west, indicating so many miles to a township corner. I went into the cabin. It was a good cabin, outside of my testimony as regards the door and window and no stove pipe hole. It had a shingle roof. It had no chimney and there was no stove-pipe hole, through the roof or through the side. The cabin was there the last time I had occasion to go over the ground. It had a gable roof, it is not what is called a shed roof. I just stepped the size of it. It was either 12x14 or 12x15. It would not have been material anyway even if it had been bigger. There was no plowed land around the cabin. There was some plowed land on an adjacent claim. There was a desert claim of Mr. Freeman's that lies not far from it, I think there is some plowed land on that. I didn't look for

any irrigating ditches. I don't on a homestead. I didn't go into any question of trying to distinguish between the fences that belonged to Mr. Cooper and Mr. Freeman. I said there was some fence intersecting a portion of this fence. I did not look where each of the corners were.

I have no information as to the conditions that existed there with reference to fences in August, 1904. Mr. Kinsey has been quite officious in assisting me in work up there; he has given me information, and given the office more or less assistance. I certainly know where the corners are; I would not report on it unless I knew; I was on the land. I went all over the land. I did not go to the quarter corners. There is very little level land there. All of that country is rolling. I think I can stand at one place and see all over the land. There had been no cultivation. You could not stand in one place and see whether or not there had been any cultivation. That would be a hard thing to determine after a lapse of years, particularly after it had grown back to grass. It is a pretty rocky piece of land; more or less rocks on all of that land. There is a spring close to the house. There is a little coulee in there that has water in it.

William L. Kinsey, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is William L. Kinsey, fifty-three years old; my occupation is farmer. I live in Cascade County, Township 19 No. Range Three West; have lived there since April, 1904. I have known Mr.

Cooper the defendant in this case, for nearly twenty-four years. He was in the sheep business. I have known him about ever since I was in Montana. I am acquainted with Mr. J. C. Freeman. Have known him probably eight or nine years. I knew him before I moved out there. He was working for Mr. Cooper. He was working for Cooper during the summer of 1904; he was working for him anyway during a portion of it. I am acquainted with the Freeman entry which is located in Section 8 and 17, Township Nineteen North and Range Three West. I first saw the entry in February or March, 1904. I was on the entry a number of times during that summer. I remember the occasion of Freeman making final proof. I can not say how many times I had been over the entry prior to that time; probably five or six times. Prior to final proof there was a house started there that had, if I remember right, the east and west sides were built up, and one or two boards on the ends, and I think a pair of rafters on each end. I was right up to the house where I could see it. There was nothing in the house; there wasn't any floor in the house; there was no roof on it at that time. There was some work done on it in June of that year by Mr. Gardipee, the gentleman sitting next to me. He was working, he finished up the roof, and put the rafters on, fihished up the ends; I saw him beginning on it in June. I never saw Mr. Freeman there. I was out there with Special Agent Foley when he made the examination. I was at the place with him.

The roof was on and a floor laid, and a hole left for a door and window; there was no stove-pipe hole. That was all the improvements I saw. I never saw any land broken up, and there wasn't any of it fenced, at the time he made the final proof. I never saw Mr. Cooper on the Freeman Claim.

CROSS EXAMINATION BY MR. WALSH:

I know nothing at all about the condition that existed in that country prior to April, February, or March, 1904. That is the first time I went into that locality. The occasion of my visiting the Freeman claim was that I was looking for land through there. There was a house started. I don't know anything about the conditions existing before I went to the claim. All I know is what I saw there. I am acquainted with Mr. Freeman. Later on the roof was on and the floor laid. There were no other improvements or buildings. I know about where the lines are. I didn't go all over the land at that time, but I was all over it during that summer and have been over it several times since. I never took the corner stones, but I was over it with Mr. Foley. I can locate the land by the section corners. Sometimes a man might be mistaken where a stone had shelled off or anything. I would not be certain, but I believe there is one forty in section eight and three in seventeen.

Edwin R. Jones, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is Edwin R. Jones. I am twenty-four

years old, my residence is St. Peter, Montana; and my occupation, stockraising. I have lived there since July, 1904. Prior to that time I lived at Great Falls, Montana. I am acquainted with the Freeman Entry. I saw the cabin on it. It wasn't finished when I saw it; it lacked a door and it lacked a window. I didn't notice whether or not it had a chimney or a stove-pipe hole. The first time I saw the land there was no fence there. That was possibly in the spring of 1905, early. I knew Freeman; met him once or twice. He was employed by Mr. Cooper, as a sheep-herder or camp tender, I couldn't say just what it was. There was no one living on the Freeman claim when I first knew it. I did not observe any evidence of any one having lived there. I was not over this claim prior to 1904.

CROSS-EXAMINATION BY MR. WALSH:

I know nothing about this claim prior to July, 1904; never saw it before that date. I knew nothing about Freeman prior to that time, nor for whom he was working. When I say he was working for Cooper, I mean after that date. I saw the Freeman claim in 1905. There was a house on it, but it was not finished. The house looked to me as if it had just been built; it had never been inhabitated, I don't think, by the looks of the lumber on the floor. That was in the spring of 1905. The cabin might have been there for a year, but no longer, from my observation. I met Freeman first in July, 1904.

Frank J. Kinsey, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"Frank J. Kinsey is my name; age is twenty-seven; ranching is my occupation; Post Office address, at Simms, Montana. I am the son of William L. Kinsey who just testified. I have lived in Montana about twenty-four years, around St. Peters and Cascade. I have a claim of my own in Section twenty-one. Moved there in 1904, sometime in April. I had been out there before in 1902, I was riding after some horses. I am acquainted with the J. C. Freeman entry. The first time I saw it was in 1902. There wasn't anything on it at that time in the way of improvements. The next time I saw it, was in 1904, last of February, or First of March. There was a house started on it at that time, and no roof on it, and no ends in it at all; just the sides propped up there. No furniture in it; no floor, nor no cooking utensils of any kind. There was some more work done on the house during the summer. I couldn't say who did the work; I didn't see who did the work on it. I saw the house several times after that. After the new work had been put on it, it had a shingle roof and the ends had been put in, and the floor down, there was a hole cut for a door, but there was no door and no place for a window, and I don't think there was stove-pipe, or a place for a stove-pipe or chimney. There was nobody living on the claim when I first saw it. There was no one I ever saw live on it. There were no other improvements on the claim. I knew Mr. Freeman when he

was working for Mr. Cooper. That was the last of June or First of July, 1904. That was the first time I became acquainted with him. That is the first time I ever knew him; he told me he was working for Mr. Cooper. I saw Mr. Cooper in and around this claim a great many times.

CROSS EXAMINATION BY MR. WALSH:

I have known the Freeman claim since 1902. The first time I saw it I was riding for horses. I did not know the boundaries of the claim exactly at that time. I did not examine to see whether or not there were any improvements on it. I was camped close there, and I was riding for the horses; I rode most all over it. The next time I saw it was in 1904. I couldn't say exactly just what time the work was done upon the house; sometime after June. I saw it almost every day during the month of April and May up until the last of June. There was a part of the house there in April. I did not see any fence on the claim at that time. Couple of years anyway, later, before they had a fence on it. I first knew Freeman the last of June or first of July, 1904.

"From the time I went out there in April 1904, he (Cooper) was up in that part of the country a good many times; I know one time, I was building a fence on my father's homestead, between there and the Carnell claim and he was talking about putting in some of the fence around the Carnell claim, he said it was his."

John Lavergure, being duly sworn, and interro-

gated by Mr. Skinner, testified as follows:

"My name is John Lavergure. I am twenty-seven years old and live at St. Peters, Montana. Have lived there about nineteen years. Am a ranch hand. I knew Mr. Cooper in 1904 or 1905. I knew Mr. Freeman. I knew him before I went to work for Mr. Cooper. I didn't know who he was working for when I first knew him. Mr. Cooper had his sheep branded, but I don't know his brand. I know Mr. Freeman. He was working for Mr. Cooper when I worked for him. I think I worked for him about three months. I know where the Freeman claim is located. I never saw anyone living on the Freeman claim. I have been in the Freeman cabin. At the time I worked for Mr. Cooper there was no door in the cabin; as to the roof, I never took any particular notice of it, nor the floor either. I don't remember just the year that final proof was made on this claim, but if I am not mistaken, that was the same year I was working for Mr. Cooper.

CROSS EXAMINATION BY MR. WALSH:

I do not know when Kinsey moved out from Cascade. I was on the Freeman homestead when I was working for Mr. Cooper. I don't know whether that was in 1904 or 1905. I worked for Cooper along about three months. I know Freeman. He was working for Cooper the same time I was working there. He was not at the Crown Butte Ranch. I don't know what they call the place, but he was running the sheep, he was running a lambing camp.

Thomas J. Short, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is Thomas J. Short. I am fifty-three years old, live in Great Falls and am tending bar there. I moved there in 1891. I am acquainted with Mr. Cooper; have known him for about eight or nine years. I filed on a claim in Township 19.

Q: How did you come to file on that claim, Mr. Short? Just tell the circumstances surrounding it, reason for it?

BY MR. WALSH: We object to that as incompetent, irrelevant and immaterial, not a matter involved or any issue in this case, don't tend to prove any of the issues in this case.

(Objection over-ruled to which defendant excepted.)

A. Mr. Cooper asked me if I had my right to file on land; I told him I did, and I filed on it that way.

I guess there was something said about how much I was to receive for using my filing right for Mr. Cooper; I have forgotten; a hundred dollars, or something; I have forgotten now; but I think it was in that neighborhoof. After the conversation with Mr. Cooper, a certain attorney came up and we went up to the Court house and filed on the land. Mr. Cooper paid the filing fee. He did the same thing with reference to my daughter. I do not know where the land was located. The description of the land I filed on was furnished by Mr. Cooper. I never was to the land. I never got the chance to go to the land.

CROSS EXAMINATION BY MR. WALSH:

I had the conversation with Mr. Cooper at the Grand Hotel. I think Mr. Cooper was to give me One Hundred Dollars. Mr. Cooper made the same arrangements with both of us. My daughter wasn't there at the time, but she went to the Court house with us. I just told her what Mr. Cooper told me, and that's all that was said. I did not get anything out of it. I was supposed to when I proved up on it in fourteen months. I never proved up on the land. I signed the usual form of affidavit for homestead entry. I don't know what I signed exactly; my daughter signed the same. I don't know why we didn't make final proof.

RE-DIRECT EXAMINATION.

I don't remember whether I signed the papers that Mr. Cooper and his attorney presented to me, or if I had papers made out. I had no interest in my daughter's claim.

John Gardipee, Sr. being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is John Gardipee, Sr. I live at St. Peter's Montana; lived there seven years. I know Mr. Cooper; have known him ten years. I know the Freeman claim out there. It is about a mile from my house. I moved out to my claim in 1903. When I first saw the house on the Freeman claim there were two sides and the rafters; no roof and no floor in. I am the Mr. Gardipee who afterwards completed the house, or put some more work on it. I put

the ends on and the rafters on the roof. I first talked with Mr. Cooper about doing the work, and settled with Cooper after the work was done. There wasn't any other buildings or improvements that I could see, on the Freeman claim when I first saw it. At the time I was there, besides the house there was a pile of lumber and shingles and some nails and a stove, and that is the same shingles and nails that I used in completing the house.

CROSS EXAMINATION BY MR. WALSH:

I lived on my claim since 1903. I completed the house on the Freeman claim in 1904, about August, the latter part of August, some time. I talked with Mr. Cooper about repairing the house and settled with him. It might have been in August, or it might have been in September; I can't remember. I did other work for Mr. Cooper. These were the only improvements I could see on the land. I cannot say where the lines of the land lie. I do not know where the lines are.

RE-DIRECT EXAMINATION; BY MR. SKINNER:

I did not see any improvements within three hundred yards of the Freeman claim. I just went out there and worked on the house. That is all I know.

John B. Gardipee, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is John B. Gardipee; I am twenty-seven years old; reside at St. Peters, Montana; have

lived there since 1903; When I first went out there I wasn't home all the time; I was single at the time and worked out all the time, pretty near; but the last couple of years I have been home all the time. In the spring of 1903 I was out there off and on. Cooper traveled through that country in the years 1902, 1903 and 1904. That is as much as I know. I never paid any attention to what he was doing. I noticed that he was traveling there off and on. I know where the Freeman claim is. I had been up there before my father did some work on the house. I first knew the Freeman claim in 1904. The cabin had just two sides up then that I know of. There was no roof, and no floor, and there was no fence around it. I never saw any ditch on the land. I worked for Cooper in 1905. I knew Freeman. He worked for Cooper part of 1904, and I think all of 1902 and 1903.

CROSS EXAMINATION BY MR. WALSH:

I know now where the lines of the Freeman claim are. I didn't in 1904. I never saw any fence or ditch on the Freeman homestead. I saw a ditch on the desert claim adjoining the homestead. At that time I didn't know where the lines were between the homestead and the desert claim, but I do now.

William Belgrade, being duly sworn, and interrogated by Mr. Skinner, testified as follows:

"My name is William M. Belgrade. I am twenty-six years old, live at St. Peter's Mission, and have lived there all my life. I know Mr. Cooper; have

known him for eight or ten years. I am acquainted with J. C. Freeman, and am a little bit acquainted with the Freeman claim. I knew it when I worked for Mr. Cooper about 1905, I guess.

Q. What was the condition of the cabin when you first saw it as to being completed, the doors and windows, in 1905?

BY MR. WALSH: Objected to as being incompetent, irrelevant, and relating to matters arising after the proof was made.

(Objection over-ruled and exception noted.)

A. The door wasn't in when I seen it.

I didn't notice the window. There were nails and lumber inside of the house. I am the same Belgrade that took up a homestead out in that section of the country. My homestead was south of the Freeman entry. I was out to Mr. Cooper's, and he asked me why I didn't take up a homestead. He showed me a piece of ground there, and I told him that I would take it up. I went to Great Falls to make out the papers. Mr. Cooper went with me. I don't remember who made out the papers. I don't recollect whether I signed any papers or not. Nobody gave me a description of the land. Mr. Cooper just showed me the land when we got there, but that wasn't the land that I filed on. It was another piece of ground. I made just one filing. I was mistaken in the land. That was on this open piece of land and that is what I intended to file on. I didn't know it until I proved up. I guess Cooper gave the Receiver of the land office the money. I think he

paid for making out the papers. I never paid out anything. I have the papers. Cooper gave them back to me when I made the relinquishment.

CROSS EXAMINATION BY MR. WALSH:

I knew Freeman when I started to work for Mr. Cooper in 1905, and I knew Mr. Cooper about the same time. I first went to the Freeman cabin in 1905. There was no door there at that time. I did not pay much attention as to whether or not the door had been taken off, but I noticed there was no door there. I don't know anything about the window. With reference to taking up a homestead, Cooper asked me why I didn't use my rights and pointed out a piece of land I could take, and I went to Great Falls and filed on land, but I filed on another piece of land and afterwards relinquished it, and that is all there is about that homestead.

It was thereupon admitted that the notice of intention to make final proof was published in the usual form and for the usual period, and the affidavit of publication filed; that the patent had been issued for the land in the usual form, on the date mentioned, and that the usual affidavit of homestead entry had been made, and that the land was thereafter purchased by and conveyed to the defendant Cooper.

Thereupon plaintiff introduced in evidence the testimony of Jacy C. Freeman and his witnesses, Richard T. Loss and William S. Kirkland, in making final proof, which testimony is as follows:

TESTIMONY OF RICHARD T. LOSS, FINAL PROOF WITNESS:

Richard T. Loss, being called upon as a witness of final proof, testified as follows:

Q. 1. What is your name, age and Post Office address?

A. Richard T. Loss, age 29 years, P. O. Cascade, Montana.

Q. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes, with both.

Q. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

A. No.

Q. 4. State specifically the character of this land —whether it is timber, prairie, grazing, farming, coal, or mineral land?

A. Grazing only, cannot be cultivated.

Q. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

A. July, 1902, settled, built house and established residence.

Q. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

A. Claimant has been there most of the time, he is unmarried.

Q. 7. For what period or periods has the settler

been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

A. He has worked out some, his total absence does not exceed three months in any one year since entering the land.

Q. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. None of the land has been broken up as it is most valuable to claimant in its natural condition as grazing land, the land is too rocky to admit of being broken up and cultivated and has been used only as grazing land, about 50 head of stock has been grazed there.

Q. 9. What improvements are on the land, and what is their value?

A. House 16x18, shingle roof, all fenced, post and three wires, irrigation ditch through it. Improvements are worth $400.

Q. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?

A. No.

Q. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. Not that I know of, think not.

Q. 12. Are you interested in this claim; and do

you think the settler has acted in entire good faith in perfecting this entry?

A. Not interested; think claimant has acted in good faith.

(Signed by witness, and duly sworn to before the Register of the United States Land office at Great Falls, Mont.)

TESTIMONY OF WILLIAM S. KIRKLAND, FINAL PROOF WITNESS.)

Q. 1. What is your name, age, and post office address?

A. William S. Kirkland, age 24 years, P. O.

Q. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes, with both.

Q. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

A. No.

Q. 4. State specifically the character of this land —whether it is timber, prairie, grazing, farming, coal or mineral land.

A. Grazing.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

A. July 2, 1902, settled, built house and commenced residence.

Q. 6. Have claimant and family resided continu-

ously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

A. Claimant has been there most of the time; he is unmarried.

Q. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

A. He has been working near there some, but his absence does not aggregate three months in any one year.

Q. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. About 50 head of stock grazed on the land all the time. None of it has been broken as it is most valuable when not broken, it is too rough and stony to break.

Q. 9. What improvements are on the land, and what is their value?

A. Good house 16x18 feet, shingle roof, post and three wire fence all around, irrigating ditch, worth $400.00.

Q. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes).

A. No.

Q. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. No.

Q. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

A. No. Claimant has acted in good faith.

(Signed by witness, and duly sworn to before the Register of the United States Land Office, at Great Falls, Montana.)

TESTIMONY OF J. C. FREEMAN, CLAIMANT:

Q. 1. What is your name, age, and post office address?

A. Jay C. Freeman, age 30 years, Post Office, Cascade, Cascade County, Montana.

Q. 2. Are you a Native Born citizen of the United States, and if so, in what State or Territory were you born?

A. Born in Missouri, U. S. A. Now live on this land in Cascade County, Montana.

Q. 3. Are you the identifal person who made homestead entry No. 13568, at the Helena Land Office on the 2nd day of July, 1902, and what is the true description of the land now claimed by you?

A. Yes, and claim SE 4 SW 4 Sec. 8, E 2 NW 4, SW 4 NW 4, Sec. 17, T. 19 No., R 3 West.

Q. 4. When was your house built on the land and when did you establish actual residence there? (Describe said house and other improvements which you

have placed on the land, giving total value thereof.)

A. July 1902, settled, built house and established residence House 16x18 feet, frame house, shingle roof, all fenced, 3 wire fence, posts of cedar one rod apart, ten acres in grass seed, irrigated. Total value of improvements $400.00.

Q. 5. Of whom does your family consist; and have you and your family resided continuously on said land since first establishing residence thereon? (If unmarried, state the fact.)

A. Myself only. Have been away some working for wages. My total absence will not aggregate more than three months in any one year, since entry. I am unmarried.

Q. 6. For what period or periods have you been absent from the homestead since making final settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

A. Have worked out some, total absence will not aggregate more than three months in any one year.

Q. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

A. The land is not fit for cultivation, and is used for grazing. None of it has been cultivated, most valuable as grazing land. Grazed about 50 head of stock on it each year.

Q. 8. Is your present claim within the limits of an incorporated town or selected site of city or town, or used in any was for trade or business?

A. No.

Q. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

A. Grazing land only, and cannot be used advantageously for any other purpose owing to the rolling condition of it, and rocky.

Q. 10. Are there any indications of coal, Salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

A. No.

Q. 11. Have you ever made any other homestead entry? (If so describe the same)?

A. No.

Q. 12. Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom, and for what purpose?

A. No.

Q. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe same, and state where the same is kept.)

A. No.

Q. 14. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

A. D. L. E. 7865, July 2, 1902, S 2 SW 4 Sec. 17, NE 4 NW 4, NW 4 NE 4 Sec. 20, T. 19 N., R. 3

West.

(Signed by witness, and duly sworn to before the Register of the United States Land Office at Great Falls, Montana.)

FINAL AFFIDAVIT OF JAY C. FREEMAN:

I, Jay C. Freeman, having made a Homestead Entry of the SE 4 SW 4 Sec. 8, E 2 NW 4, SW 4 NW 4 Section No. 17, in Township No. 19 N. of Range No. 3 West, subject to entry at Helena, Montana under Section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of Section No. of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a Native born Citizen of the United States; that I have made actual settlement upon and cultivated and resided upon said land since the 2nd day of July 1902 to the present time; that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole Bona Fide owner as an actual settler; that I will bear true allegience to the Government of the United States; and further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

(Signed, Jay C. Freeman, and duly sworn to before the Register of the United States Land Office at Great Falls, Montana.)

RECEIVER'S FINAL RECEIPT, and NON-MINERAL AFFIDAVIT IN THE USUAL FORM ALSO INTRODUCED IN EVIDENCE.)

Thereupon Plaintiff rested.

DEFENDANT'S TESTIMONY:

Frank D. Cooper, being duly sworn, and interrogated by Mr. Walsh, testified as follows:

"My name is Frank D. Cooper. I am the defendant in this suit. I have lived in Montana since the Fall of 1872. My business is stock business principally. I was in the legislature in territorial days, and I served on the Board of Commissioners two terms, for Cascade County. I know in a general way the land called the Freeman Homestead. I was not on that land until after I had purchased it. I have been around there, of course, I have been in sight of it, around there where I could see it. I purchased the land from Mr. Freeman and paid him a money consideration for it. I purchased it in good faith. At the time I purchased it I had no knowledge that it was claimed that he had not complied with the law with reference to residence and the law with reference to the improvements that must be put on the land. I know Mr. Belgarde, and I heard his testimony with reference to his homestead entry. I had nothing to do with his making that entry, and it was not made under any arrangements with me. I know Thomas Short. I heard his testimony. I did not make any arrangements with him for making his entry, and I did not make any arrangements

with him with reference to a homestead for his daughter; I never saw his daughter that I remember of. I think he made inquiry of me about the land. Lots of people up there did that. I kept maps of that country and people often asked me about different pieces of land. Probably Belgarde did. I can't say positively. He may have asked me if there was any government land over there in that country. I don't remember any conversation that I had with him, but there has been a good many inquiries about government land, and there is at the present time about government land up there. I have sold the land which I purchased from Freeman.

BY MR. SKINNER: I want to see the contract. I assume this land is described, Mr. Walsh, in this contract?

BY MR. WALSH: Yes. There is a long description, and I had to check it over to see that it was correctly described.

BY MR. SKINNER: If your Honor please, all this testimony with reference to the sale of lands is objected to on the ground that the agreement is dated, Dece,ber 13, 1909; that the records of the clerk of the United States Circuit Court for the District of Montana show that the bill of complaint was filed in the Clerk's office on the 7th day of December, 1909; I think the contract should be introduced in evidence. It may be made a part of the record as an exhibit.

Contract offered and received in evidence is as

follows:

AGREEMENT.

THIS AGREEMENT, made and entered into this 13th day of December, A. D., 1909, by and between Frank D. Cooper, and Alice G. Cooper, his wife, both of Cascade, County of Cascade, Montana, parties of the first part, and Geo Heaton of Perry, Dallas County, Iowa, party of the second part;

WITNESSETH:

That the said parties of the first part have this day sold to the party of the second part, subject to the terms of this agreement, twenty-one thousand eight hundred and forty (21,840)acres of land, more or less according to the Government survey, situate in Cascade and Lewis and Clark Counties, Montana, and more particularly described in Exhibits, A, B, C, D, and E, hereto attached and made a part hereof.

The party of the second part agrees to pay for said lands at the rate of Five and 70/100 Dollars ($5.70) per acre in the following manner, to-wit:

Twenty Thousand ($20,000.00) Dollars on or before thirty days after receipt at the office of the second part at 219 Gilfillan Block, St. Paul, Minnesota, of an abstracte compiled by a reliable abstractor, showing a right to such title, to all the property herein sold except two thousand (2000) acres in the parties of the first part, as will enable the first parties to convey the said property accord-

ing to this agreement, and the parties of the first part agree to obtain title to the said two thousand acres excepted and furnish perfect abstract with reasonable diligence;

Twenty-five Hundred Dollars ($2,500.00) at the signing hereof, receipt whereof is hereby acknowledged. Said amount is to be paid by drawing on the second party through a bank designated by Frank D. Cooper, and this agreement to be mailed by said bank to the second party for his signature upon the return of such draft paid;

Ten Thousand Dollars ($10,000.00) on July, 1, 1910.

Fifteen Thousand Dollars ($15,000.00) on October 1, 1910.

It is agreed that the second party may have an extension of the time in which to make the last mentioned payment up to January 1, 1911, if he so desires, and in case of the exercise of this right of extension said payment shall draw interest at the rate of eight per cent per annum during such extension;

The balance shall be paid in five annual installments payable on October 1 of each year after October, 1910.

The deferred payments shall not draw interest till after October 1, 1910, except during such extension of time of payment as hereinbefore mentioned.

From and after October 1, 1910, the deferred payments shall draw interest at the rate of six per cent per annum, subject to the exceptions hereinafter mentioned.

The second party may have an extension of not more than ninety days after the due date of each payment after October 1, 1910, in which to make said payment, and in case of the exercise of this right of extension, or any part thereo, the second party shall pay interest on such payment at the rate of eight per cent per annum during the period of such extension.

The first party is to remain in possession of said premises till August 1, 1910, at which time possession is to be surrendered to the second party or to his agents, provided the second party has fulfilled the portions of the contract to be performed by him prior to said date.

The second party is to have the right to enter upon said premises at any time hereafter for the purpose of surveying and carrying on such engineering work as he may desire.

The second party is to have the right to crop any portion of said premises during the year 1910, which has heretofore been cultivated.

The first party agrees to irrigate the wild and tame hay, if possible, during the year 1910, up to August 1 of said year.

Upon the fulfillment of the terms of this agreement by the second party, the first party agrees to convey to the second party, all lands set out in Exhibit "A" hereto attached, and all lands set out in Exhibit "B" hereto attached to which said first party has obtained or can obtain, deed from the Northern Pacific Railway Company, and all lands

set out in Exhibit "D" hereto attached, subject to the terms of this agreement.

All lands conveyed to the second party under this agreement shall be conveyed in fee simple by Warranty deed free from reservations and incumbrances.

The first parties warrant that the lands set out in Exhibit "B" hereto attached, are under contract between Frank D. Cooper and the Northern Pacific Railway Company bearing date of January 18, 1909. The first parties agree to fulfill the obligations of Frank D. Cooper to the Northern Pacific Railway Company as set out in said contract date January 18, 1909. The first parties agree to use their best efforts to obtain deeds from the Northern Pacific Railway Company to the property set out in Exhibit "B."

It is agreed that the first parties will convey to the second party, by similar warranty deed as hereinbefore mentioned, all property set out in Exhibit "B" to which they obtain deeds, or can obtain deeds, from the Northern Pacific Railway Company under said contract of January 18, 1909. It is agreed that should the first parties be unable to obtain deeds from the Northern Pacific Railway Company to some of the property set out in Exhibit "B", after the fulfillment of the obligations of Frank D. Cooper under said contract of January 18, 1909, then and in that case said first parties are not required to convey to the second party such property set out in Exhibit "B" as they are unable to obtain

deeds to from said Northern Pacific Railway Company, and the second party is not required to pay for such property not conveyed.

It is agreed that the first parties will not permit any of the wild or tame hay to be grazed upon between May 15 and up to August 1, 1910, and that the second party shall have such hay crop with the right to cut and put up the same when desired.

The first parties agree to use their best efforts to speedily obtain clear title to the property set out in Exhibit "D", and to convey the same to the second party under this agreement when title is obtained. If title cannot be obtained, then said first parties are not required to convey the same to the second party.

The first parties agree to deliver possession of said premises to the second party on August 1, 1910, in their present condition of repair, usual wear and tear and action of the elements excepted.

The first parties agree to assign to the second party, or persons designated by him, at the time of the delivery of possession of said premises, all State leases on the property set out in Exhibit "C" hereto attached.

The first parties agree to make all payments accruing on State leases on the property set out in Exhibit "C" prior to the delivery of possession of said premises.

The first parties agree to pay the taxes on the premises for the time they remain in possession of the same.

The first parties agree to pay the second party interest on all money paid prior to the delivery of possession of the premises at the rate of six per cent per annum, said interest to be deducted by the second party from the next payment due to the first parties from the second party after possession is delivered.

The first parties are to furnish the second party an abstract of title to all water rights conveyed under this agreement, which water rights are as per Exhibit "E" hereto attached. Said abstract of said water rights is to be furnished at the same time that the abstract to the other property is furnished, and shall show title to said water rights in the first parties as set out in Exhibit "E" hereto attached, and said first parties agree to convey said water rights when said land is conveyed.

It is agreed that time is the essence of this contract and that upon the failure of the second party to make any of the payments of principal or interest at the time and in the manner as herein set out, then and in that case the first parties at their option, may, upon sixty days' notice to the second party, declare this contract forfeited and they may return into possession of said premises, and that all payments made under this contract shall be forfeited to the parties of the first part, and this contract shall become void and of no effect.

All payments to be made under this contract are to be made to the Great Falls National Bank, Great Falls, Montana, to the credit of Frank D. Cooper,

and payment by check shall constitute a payment provided the said check is honored in the usual course of business.

Interest which is to be paid under this contract is to be paid on each payment at the time that payment is made.

This agreement is made in triplicate and executed in duplicate, one original with Frank D. Cooper and Geo. Heaton, and on copy with John Marshall.

(Signed) FRANK D. COOPER.
ALICE G. COOPER.
GEO. HEATON.

Witness for their Signature:
JOHN MARSHALL,
Twodot, Mont.

Witness for first two signatures:
MELVIN ROWE.
Witness as to Geo. Heaton.
JAMES DENEGRE.
(Duly Acknowledged.)

Exhibit A. Mentioned containes a description, with other lands, of the SE 4 SW 4 Sec. 8, E 2 NW 4, SW 4 NW4, Sec. 17, T. 19, N., Range 3 West, being the lands involved in this action.

Exhibit "B" contains a list of the unpatented lands purchased from the Northern Pacific Railway Company.

Exhibit "C" contains a description of the lands leased from the State of Montana.

Exhibit "D" contains a description of other lands.

Exhibit "E" contains a description of water rights.

Witness continues:

Q. Who has got possession of these lands now?

A. Oh, it is Barth, and Ross and King.

BY MR. WALSH: I will ask leave to withdraw the Exhibit and make a copy of it.

BY THE MASTER: Very well, you may submit a copy.

Cooper: That was A. H. Barth, J. R. King and Thomas Ross.

CROSS EXAMINATION BY MR. SKINNER.

As near as I can remember, I moved into that township in 1876. I don't think I took up a homestead at that time, think, it was a little later on. I don't know when I took it up, but it was two or three years later I should judge. I was born in April 1851. I have lived there continuously since the time we moved there, excepting that my family lived in Helena for a while, and we have also lived in Great Falls for the purpose of sending the children to school; but my home has been there continuously. In the year 1899, I don't remember whether I was there or not. I was there probably from time to time, but whether or not it was continuously in that year I couldn't say. During that time I was engaged principally in the sheep business, and also

cattle, and I employed a great many sheep herders and other men to look after my sheep, up to the year 1905. Mr. Freeman worked for me, but I couldn't state just exactly what time. I didn't keep any books of my business, but I kept a time book. I have not that book with me; it was just a memorandum book of the time. I couldn't state positively whether Mr. Freeman was in my employ in 1902. I couldn't say when I first became acquainted with him. I think he had worked for me several times, and I think he worked for me prior to that, but I couldn't state what dates he did work exactly. I did not go to Great Falls with him when he made his final proof, not that I remember. I do not know who prepared the Freeman papers, and I do not know who prepared the final proof. I was not present at the time of the proof. I don't remember it. I don't remember that I went to Great Falls with Mr. Freeman at the time he went there to make the final proof. I have not the deed here that Freeman gave me for this land. I do not remember whether it was the same date that he made final proof that I took the deed or not. It was about that time, somewheres, but I don't know whether it was that date or not. I don't remember of paying Freeman's fees for final proof. If I owned him anything,—if he asked for it at any time, he got it, of course. I don't remember of lending him any money, but I may have lent him some; I lent small amounts lots of times, but I couldn't remember the dates or anything of that kind. I don't remember how much I

paid him for the land. I don't remember whether the true consideration is stated in the deed. I have no recollection of being on the Freeman place between July 1902, and August 18, 1904. I have no recollection of ever being on it, only that I passed in sight of it, along the lower Carnell field. I don't know where the lines are. I never examined any of the lands that I purchased there. I was familiar with all the land around there. I bought land there from the Railroad company two years ago at two dollars an acre, without making any examination of it. As far as a close examination goes, I never examined any of the lands that I purchased there. That is grazing land, land that I bought and just kept for pastures. I can't tell whether I paid Mr. Freeman Two hundred, four hundred, or six hundred dollars for his land. When purchasing land I don't take into very much consideration the improvements on it; I don't allow very much on improvements, and for that class of land the improvements don't cut much of a figure. At the time I bought this land I could not say whether there was a house on it or not, or whether there was a fence, and irrigating ditch. I don't remember about that, at that time. I don't think I have been more than in sight of it but once since. His house is there now; I saw it from off at a distance. The other improvements, I don't remember whether I saw them or not. I don't remember being in Great Falls on the day that Mr. Freeman made his final proof. I know Richard T. Loss and William S. Kirkland.

They worked for me, but I couldn't state the time when it was, exactly. I don't know if they worked for me when Mr. Freeman worked for me or not. In fact, pretty nearly all the boys up in that neighborhood have worked for me at some time or another, but I can't remember the dates and times. I know the Crown Butte Ranch. I had a winter sheep camp there. I don't remember that I employed Mr. Gardipee to fix up the Freeman cabin. If I paid him for it, it was after I purchased it. As near as I can remember, Gardipee has worked for me at different time, and I couldn't tell only in a general way. I don't remember that I knew that the cabin was not completed; I don't know much about it; I don't know whether I got this knowledge before or after I purchased it. I did not know that Freeman filed on the land, only in a general way. I don't remember having any conversation with Freeman about making an entry, excepting in a general way. I do not remember having any conversation in Great Falls with Mr. Short. There was a conversation about land in a general way all the time, but I don't remember any conversation about taking up any. He spoke to me something along that line. I might have asked him what kind of a claim he was looking for,—something of that kind. I don't remember of having his papers made out for him; I don't remember anything about who made out his papers. I don't remember being present at the land office when he or his daughter signed the papers. I don't remember seeing his daughter at

all. I don't remember talking with Short about his daughter taking up land. I don't remember paying for the making of the papers, or the filing fees for Mr. Short or his daughter. I never offered Short or anybody else one hundred dollars for his filing rights by proving upon in fourteen months; or any other consideration in that way. I had no conversation with Mr. Belgarde as he testified. He may have asked me a question about where was the land, the same as a great many others do. If I pointed out the land to him I would have been on the land. That land there is some distance away, some four, or five or six miles. I don't think he knows where the ground is today. I think so in a general way. He was just talking to be talking. I know I didn't pay his filing fee. If he was working for me he might have got the money. If it was paid it was charged up to him. He would have sense enough to know that it was charged up to him. But I don't know how he got the money. If he got any money it was charged up to him. Barth, Ross and King are not the men who bought this land. They have leased it at present from Mr. Heaton. I sold Heaton 21,848 acres of land, which is all the land that that I owned in the immediate vicinity of what I call my home ranch. I bought about 14,000 acres from the Northern Pacific Railway Company.

RE-DIRECT EXAMINATION BY MR. WALSH:

The home ranch is about seven or nine miles from the Freeman land, the way we travel it. When I was away I always had a foreman in charge. To the best of my recollection, I never paid any filing fees for Thomas Short or his daughter.

RE-CROSS EXAMINATION BY MR. SKINNER:

Why, I know I didn't pay their filing fees. Someone might have borrowed money or something of that kind, but I never paid their filing fees. That is a long while ago to remember these conversations. I don't think I would give anybody money to file on a piece of land,—a saloon keeper.

And the foregoing is all the evidence that was introduced. And thereafter the Court filed its opinion in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONANA.

UNITED STATES OF AMERICA,

vs. No. 946.

FRANK D. COOPER and GEO. HEATON.

Herein the Court finds that Freeman, entryman of the land involved, did not built any house upon said land, did not reside thereon, did not fence the same, nor any or either of them prior to his final proof; that his improvements did not exceed $100; that defendant Cooper knew the foregoing facts

when he purchased said land from Freeman; that said defendant did not pay a valuable consideration therefor. And therefrom the Court concludes that the aforesaid final proof was false and fraudulent, was believed and relied upon by complainant and induced issuance of the patent involved; that defendant Cooper is not a bona fide purchaser of said land; that cancellation of said patent has become impracticable since suit brought; that complainant is entitled to the relief of damages against defendant Cooper in the value of the land, $5.70 per acre, with legal interest from December 13, 1909, and all costs; that unless paid by defendant Cooper, defendant Heaton shall pay the amount thereof to complainant from the unpaid purchase money owing by defendant Heaton to defendant Cooper upon his contract of purchase of said lands when made a part hereto and appearing herein, such payment to discharge said purchase price to the extent thereof; that complainant have a lien therefore upon the land involved for security, and foreclosure thereof. And decree accordingly will be entered.

January 20, 1914.

BOURQUIN, J.

Now comes the defendant, Frank D. Cooper, and presents the foregoing as his Statement on Appeal, and moves that the same be approved by the Court.

JAMES A. WALSH,

Solicitor for the Defendant,
Frank D. Cooper.

I, the undersigned, Judge of the above named Court, do hereby certify that the foregoing Statement of Record on Appeal is true, complete, and properly prepared, and the same is therefore hereby approved by the Court.

Dated this 15th day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,
Judge.

(Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.)

And thereafter, the defendant, Frank D. Cooper, served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

NOTICE OF LODGEMENT OF TRANSCRIPT ON APPEAL.

No. 946.

To the above named complainant, and Mr. B. K. Wheeler, United States Attorney for the District of Montana, its solicitor, and Mr. S. C. Ford, Assistant United States Attorney, and to the defendant, George Heaton, and Messrs. Day and Mapes, his Solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE:

That the statement of record on Appeal of the Defendant, Frank D. Cooper, in the above entitled action has been lodged, and is now in the office of the clerk of the above named Court.

AND YOU WILL FURTHER TAKE NOTICE: That at the United States Court Room in the City of Helena, Montana, on the Twenty-second day of June, Nineteen Hundred and Fourteen, at the opening of Court, on that day, or as soon thereafter as counsel can be heard, the undersigned will ask the Court to approve the said Statement on Appeal, so prepared and lodged with the Clerk as aforesaid.

Dated this 11th day of June, A. D., Nineteen Hundred and Fourteen.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Service of the foregoing notice accepted and copy thereof received this eleventh day of June, 1914.

B. K. WHEELER,
United States Attorney for the District of Montana and Solicitor for the complainant.

DAY & MAPES,
Solicitors for Defendant George Heaton.

And thereafter the defendant, Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

NOTICE OF SUMMONS AND SEVERANCE.

TO THE ABOVE NAMED DEFENDANT, GEORGE HEATON, and MESSRS. DAY AND MAPES, his Solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE:

That the defendant, FRANK D. COOPER, in the above entitled action, intends to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and decree made, given and entered by the above named court in the above entitled cause, and filed on the 28th day of January, Nineteen Hundred and Fourteen, and the said defendant, Frank D. Cooper, hereby requests that you join with him in the said appeal, and upon your failure to so join with him in said appeal, then he will prosecute the said appeal alone.

JAMES A. WALSH,
Solicitor for defendant,
Frank D. Cooper.

Service of the foregoing notice admitted and copy thereof received this twenty-fifth day of June, Nineteen Hundred and Fourteen, and the said George Heaton hereby refuses to join in said appeal.

DAY & MAPES,
Solicitors for the Defendant,
George Heaton.

Copy of the foregoing received, June 26th, 1914.

B. K. WHEELER,
U. S. Attorney.

Endorsed: Filed June 26, 1914. Geo. W. Sproule, Clerk.

And thereafter the Defendant, Frank D. Cooper, served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

NOTICE.

To the above named defendant, George Heaton, and Messrs. Day and Mapes, his Solicitors:

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE:

That at the court room in the City of Helena, Montana, on the Second day of July, Nineteen Hundred and Fourteen, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned will call up the motion hereto annexed and herewith served upon you.

JAMES A WALSH,
Solicitor for the defendant,
Frank D. Cooper.

Service of the foregoing notice admitted and copy thereof received, and copy of motion received this 26th day of June, A. D., Nineteen Hundred and Fourteen.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.
B. K. WHEELER,
United States Attorney for the
District of Montana.

Endorsed: Filed June 26th, 1914. Geo. W. Sproule, Clerk.

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

MOTION.

Now comes the defendant, Frank D. Cooper, and moves the court for an order permitting him to prosecute alone an appeal from the judgment and decree made, given and entered in the above entitled action, and filed on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, for the reason that his co-defendant, George Heaton, refuses to join in the appeal.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Endorsed: Filed June 26, 1914. Geo. W. Sproule, Clerk.

And thereafter the Court made and entered the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

ORDER OF SEVERANCE.

A judgment having been on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, duly made, given and entered in the above entitled cause against the above named defendants, and the defendant, Frank D. Cooper, having on the 25th day of June, A. D., Nineteen Hundred and Fourteen, served on his co-defendant, George Heaton, a summons, and a notice of his intention

to appeal from the said judgment, and requesting the said George Heaton to join with him in said appeal, and notifying him that upon his failure to so join, that he, the said defendant Frank D. Cooper, would prosecute the said appeal alone; and the said defendant, George Heaton, having in writing declined to join in the said appeal, and the said defendant, Frank D. Cooper, having on the 26th day of June, A. D., Nineteen Hundred and Fourteen served upon his co-defendant, George Heaton, notice of motion of severance and that he, the said Frank D. Cooper be allowed to prosecute the said appeal alone, and which said notice and motion was likewise, on said date, served upon the complainant; and the said motion coming on for hearing the Second day of July, A. D., Nineteen Hundred and Fourteen, and the court having duly considered the same;

IT IS THEREFORE ORDERED: That the interest of said defendant, Frank D. Cooper, be, and the same is hereby severed from the defendant, George Heaton, and the said defendant, Frank D. Cooper be allowed to prosecute the said appeal alone.

IT IS FURTHER ORDERED: That this order and the motion and notices above mentioned be made a part of the record on appeal.

Dated this Second day of July, A. D., Nineteen Hundred and Fourteen.

GEORGE M. BOURQUIN,
JUDGE of the above named Court.

Due service of the foregoing is hereby admitted this Second day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 2, 1914. Geo. W. Sproule, Clerk.

And thereafter the defendant Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

PETITION FOR APPEAL:

To the Honorable, the Judge of the above named Court:

The above named defendant, Frank D. Cooper, conceiving himself to be aggrieved by the decree entered herein on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, in the above entitled proceeding, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and that a citation issue as provided by law, and that a transcript of the record and proceedings and papers upon which said decree was based, duly authenticated,

may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper order fixing the security to be required of him to perfect his said appeal be made.

JAMES A. WALSH,
Solicitor for Defendant,
Frank D. Cooper.

Due service of the foregoing is hereby admitted this Second day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the Defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And at the same time the defendant Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

ASSIGNMENT OF ERRORS.

The defendant, Frank D. Cooper, in the above entitled action, in connection with his appeal, hereby makes the following assignment of errors, which he avers occurred in this cause, to-wit:

I.

It was error for the court to hold and find that Jay C. Freeman, entryman of the land involved, did not build any house upon said land, and did not reside thereon, and did not fence the same, nor any or either of them prior to his final proof.

II.

It was error for the Court to hold and find that his, Freeman's, improvements die not exceed One Hundred Dollars in value, and that the defendant Cooper knew the said facts, or any of said facts when he purchased the said land from Freeman, or at any other time.

III.

It was error for the court to hold and find that the defendant Cooper knew of the facts or any of the facts set forth in specific paragraphs Numbered One and Two, when he purchased the said land from Freeman, or at any other time.

IV.

It was error for the court to hold and find that the defendant, Frank D. Cooper did not pay a valuable consideration for the land embraced in the Freeman entry.

V.

It was error for the court to conclude, hold and find that the final proof of the entryman, Freeman, was false and fraudulent, or that the complainant was induced to issue the patent herein involved by relying upon any false or fraudulent statements.

VI.

It was error for the court to conclude, hold and find that the defendant Frank D. Cooper is not or was not a bona fide purchaser of said land.

VII.

It was error for the court to conclude, hold and find that the complainant is entitled to the relief of damages against the defendant Frank D. Cooper in the alleged value of the land, Five and 70/100 ($5.70) Dollars per acre, as stated by the court, with legal interest from December 13th, Nineteen Hundred and Nine, amounting in all to Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and all costs.

VIII.

It was error for the court to conclude, hold and find that the value of the land was or is Five and 70/100 ($5.70) Dollars per acre, no evidence having been introduced as to value.

IX.

It was error for the court to conclude, hold and find that unless the said sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars was paid by the defendant Frank D. Cooper, that the defendant George Heaton shall pay the amount thereof to complainant from the unpaid purchase money owing by the defendant Heaton to the defendant Frank D. Cooper upon his contract of purchase of said lands when made a party hereto and appearing herein.

IX.

It was error for the court to conclude, hold and find that such payment, when made by the said Heaton, should be a discharge of said purchase price to the extent thereof.

X.

It was error for the court to conclude, hold and find that the complainant has a lien for the said sum of Twelve Hundred and Twelve and 96/100 ($1212.-96) Dollars upon the land involved, and was entitled to the foreclosure thereof.

XI.

It was error for the court to conclude, hold and find that the complainant was entitled to a decree according to the findings and conclusions of the Court.

XII.

It was error for the court to order, adjudge and decree that the complainant have and recover from the defendant Frank D. Cooper the sum of Nine Hundred and Twelve ($912.00) Dollars, with interest from the 13th day of December, A. D., Nineteen Hundred and Nine, (1909), amounting in all to the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, together with the costs and taxes, for that, no issue was raised in the pleadings, and no evidence was introduced concerning the value of the land.

XIII.

It was error for the court to order, adjudge and decree that unless the said amount, Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and costs, be paid by the defendant, Frank D. Cooper, that the defendant, George Heaton, pay the same to the complainant from the unpaid purchase money claimed to be owing by the said George Heaton to the defendant Frank D. Cooper upon his contract for the purchase of the lands.

XIV.

It was error for the court to order, adjudge and decree that upon such payment being made by the said defendant George Heaton it shall discharge the purchase price to the extent thereof.

XV.

It was error for the court to order, adjudge and decree that the complainant have a lien upon the lands and premises mentioned in the complaint, for the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and the costs, and that it is entitled to the foreclosure thereof.

WHEREFORE: The said defendant, Frank D. Cooper, prays that the said judgment of the said District Court of the United States, for the District of Montana, rendered in the said suit be reversed.

JAMES A. WALSH,
Solicitor of the Defendant,
Frank D. Cooper.

Due service of the foregoing assignment of errors is hereby admitted this 15th day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.
DAY & MAPES,
Solicitors for the Defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And thereupon the court made and entered the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

ORDER ALLOWING APPEAL.

On this day came the defendant, Frank D. Cooper and presented his petition for appeal, and his assignments of error accompanying the same, which petition, upon consideration thereof, was allowed, and the court allowed the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon filing a bond in the sum of Fifteen Hundred Dollars, with good and sufficient security to be approved by the Court.

And it further appearing that the defendant, George Heaton was notified in writing to join in the said appeal, or to decline to join in such appeal; and it further appearing that the said George

Heaton has declined to join in the appeal, and has severed himself from the defense of this cause, the said defendant Frank D. Cooper is hereby granted his appeal as aforesaid, and his interest is severed in said appeal from the other defendant, George Heaton, herein.

Dated this 15th day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,
JUDGE of the above named Court.

Due service of the foregoing is hereby admitted this 15 day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And thereupon, the defendant, Frank D. Cooper, executed and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That I, FRANK D. COOPER, as principal, and J. L. TRUSCOTT and E. D. COLEMAN of Glasgow, Montana, as sureties, are held and firmly bound

unto the United States of America, in the sum of Fifteen Hundred ($1500.00) Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we do hereby bind ourselves, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 6 day of July, A. D., Nineteen Hundred and Fourteen.

WHEREAS, the above named defendant, FRANK D. COOPER, has prosecuted an appeal to the United Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered in the above entitled cause in the United States District Court for the District of Montana, made and entered on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen.

NOW, THEREFORE, the condition of this obligation is such that if the above named defendant Frank D. Cooper, shall prosecute the said appeal to effect and shall answer all damages and costs that may be awarded against him if he fails to make good his appeal then the above obligation is to be void; otherwise to remain in full force and virtue.

It is expressly agreed by the said J. L. Truscott and E. D. Coleman, the sureties above named, that in case of a breach of any condition of this bond, the court may, upon notice of not less than ten days, to the said J. L. Truscott and E. D. Coleman, proceed summarily in this action to ascertain the amount which such sureties are bound to pay on ac-

count of such breach, and render judgment against them for said amount and award execution therefor.

IN TESTIMONY WHEREOF: We have hereunto set our hands and seals this 6th day of July, 1914.

FRANK D. COOPER. (SEAL)
J. L. TRUSCOTT. (SEAL)
E. D. COLEMAN. (SEAL)

STATE OF MONTANA,
COUNTY OF VALLEY,—ss.

J. L. TRUSCOTT and E. D. COLEMAN, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, and not for the other says: That he is a resident and freeholder or householder in the said County of Valley, State of Montana, and that he is worth the sum in the said undertaking, specified over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

J. L. TRUSCOTT. (SEAL)
E. D. COLEMAN. (SEAL)

Subscribed and sworn to before me this 6th day of July, A. D., Nineteen Hundred and Fourteen.

C. D. ARNOLT,
Notary Public in and for the State of Montana; residing at Glasgow, Montana.

(SEAL.)

My Commission expires Jan. 26, 1915.

The foregoing bond is hereby approved this 15th

day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,
JUDGE of the above Named Court.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And thereupon the court approved said bond, and issued the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

CITATION.

UNITED STATES OF AMERICA:

TO THE UNITED STATES OF AMERICA, Complainant and Appellee, and to B. K. WHEELER, United States Attorney, Solicitor for Appellee, and to GEORGE HEATON, defendant, and MESSRS. DAY & MAPES, his Solicitors, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein Frank D. Cooper is the appellant, and the United States of America and George Heaton are the Appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be

corrected and reversed, and speedy justice should not be done to the parties on their behalf.

WITNESS, the Honorable George M. Bourquin, Judge of the United States District Court, for the District of Montana, this Fifteenth day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,
Judge of the District Court for the
District of Montana.

Due and personal service of the above citation is hereby admitted, and copy received and acknowledged this Fifteenth day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney.
DAY & MAPES,
E. C. DAY & T. D. MAPES,
Solicitors for the Defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And thereafter the defendant Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 946.

PRAECIPE.

TO THE HONORABLE B. K. WHEELER, UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT OF MONTANA, Solicitor for the complainant, and to MESSRS. DAY & MAPES, Solicitors for the Defendant, George Heaton:

THE UNDERSIGNED, Solicitor for the defendant and appellant, herein, Frank D. Cooper, hereby files and serves upon you his praecipe, in conformity with the rules of Court, hereby indicating the portions of the record to be incorporated into the transcript on appeal herein, and which said portions of said record you are hereby notified the said defendant and appellant will incorporate and include in the record on appeal. Said portions are as follows, to-wit:

A.

Judgment Roll, consisting of:

1. Bill of Complaint.
2. The Clerk's note following the Bill of Complaint.
3. The Subpoena.
4. The answer of the defendant, Frank D. Cooper, to the Bill of Complaint.
5. The Replication.
6. Order allowing Amendments to the Bill of Complaint.

7. The Notice, and Amendments to the Bill of Complaint.

8. The order to serve on the defendant George Heaton by publication.

9. Return of the Mashall.

10. Separate Answer of the defendant, George Heaton.

11. Replication to the Answer of the defendant, George Heaton.

12. The Decree.

13. The Certificate of the Clerk.

B.

The evidence introduced as incorporated in the statement of record on appeal.

C.

A memorandum of the documents introduced in evidence.

D.

A memorandum of the opinion of the Court.

E.

Defendant's notice to settle Bill of Exceptions.

F.

Certificate of Judge.

G.

Notice of Defendant Cooper's intention to appeal, and request to the defendant George Heaton to join in the appeal.

H.

Acceptance of service of the notice, and refusal to join in the appeal.

I.

Motion of Severance.

J.

Notice of Motion of Severance.

K.

Order of Severance.

L.

Petition for Appeal.

M.

Assignment of Errors.

N.

Order Allowing Appeal.

O.

Citation.

P.

Bond on Appeal.

Q.

This Praecipe.

R.

Insert the title of the cause in full in the Bill of Complaint.

S.

Omit the title of the court and cause in all subsequent papers and pleadings, excepting the statement, "Title of Court, Title of Cause."

T.

Omit the endorsements, excepting to state, "Filed," giving the date and the name of the clerk.

U.

Insert the acknowledgments of service of papers complete.

JAMES A. WALSH,
Solicitor for the defendant,
Frank D. Cooper.

TO GEORGE W. SPROULE, Clerk of the above named Court:

You will please prepare the record on Appeal in the foregoing entitled cause, and incorporate therein the papers and records set forth in the foregoing Praecipe.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Due service of the foregoing admitted this 15th day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.
DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

(TITLE OF COURT, TITLE OF CAUSE.)

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MONTANA.—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of ~~110~~ 107 pages, numbered consecutively from One to ~~110~~ 107 inclusive, is a true and correct transcript of the pleadings, processes, final decrees, orders, testimony and all other proceedings had in said cause, and of the whole thereof as appears from the original files and records of said court in my custody as such clerk; and I further certify and return that I have annexed to said transcript, and included within said pages, the original citation issued in said cause; all the foregoing being included in the statement or final record herein as approved by the Judge of this court.

In Testimony Whereof: I have hereunto set my hand and affixed the seal of this Court, at Helena, Montana, this Eighth day of August, A. D. Nineteen Hundred and Fourteen.

Geo. W. Sproule
Clerk.

Seal

No. 2460.

6

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Complainant and Appellee.

GEORGE HEATON,

Defendant Not Joining in Appeal.

No. 946.

APPELLANT'S BRIEF.

JAMES A. WALSH,
Solicitor for Appellant,
Helena, Montana.

NAEGELE PRINTING CO., HELENA, MONT.

United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 2460.

FRANK D. COOPER,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Complainant and Appellee.

GEORGE HEATON,

Defendant Not Joining in Appeal.

No. 946.

APPELLANT'S BRIEF.

This suit was prosecuted by the Complainant to cancel a patent for One hundred sixty acres of land, situated in the Helena, Montana, Land District. It is alleged that Jay C. Freeman made a

homestead entry, making the affidavit and paying the fees required by law (Tr. 3-4). That it was incumbent upon said Freeman to make an actual settlement, cultivate and reside upon said lands for a period of five years (Tr. 5). That the said Freeman made final proof on the 18th day of August, 1904, corroborated by two witnesses, William S. Kirkland and Richard T. Loss. That the said Freeman and his witnesses swore that he had resided five years upon the land, and had placed improvements thereon of the value of Four hundred Dollars, (Tr. 6-7). That a final receipt was issued on the 23rd day of August, 1904, and on the tenth day of February, 1905, a patent was issued for said lands (Tr. 9).

That the said affidavits were false and fraudulent. That the said Freeman did not establish his residence upon said land or reside thereon or put the improvements on said land, set forth in his affidavit, and that said affidavits were false and untrue in every particular. (Tr. 9-10-11). That the officers of the land office believed said affidavits, and believed them to be true, and issued to said Freeman a final certificate, and thereafter issued and delivered to him the patent.

That the said Freeman conveyed the lands to the defendant Cooper and that said Cooper occupies said lands and claims ownership thereof. (Tr. 12-13). That said Cooper was not a purchaser in good faith or for a valid consideration, but purchased the same with complete knowledge of the fraud of the said Freeman (Tr. 14-15). And

the Complainant prayed that the patent so issued be declared void and cancelled and the legal and equitable right of possession be restored to the complainant (Tr. 15-16-17).

The defendant Cooper answered denying all knowledge as to the fraud claimed to be perpetrated by Freeman, admitting the conveyance to him and his possession; denied that it was not purchased in good faith, and averred that he purchased the lands in good faith, paid a valuable consideration therefor, and believed and now believes that the said Freeman procured the title to said lands in good faith, and had in all things complied with the law, and without any notice or knowledge that said Freeman had not complied with the law or that it was claimed that he had not so complied (Tr. 20-26).

The defendant further averred that prior to the commencement of the action he entered into a contract with George Heaton and sold the land to him in good faith and for a valuable consideration, and that Heaton purchased it without any notice of the claim of the complainant that said Gilbert had not in all things complied with the law (Tr. 25).

To this the complainant interposed a general replication (Tr. 27). Thereupon testimony was taken, and at the conclusion of the hearing the Court held that Heaton was a necessary party and directed that he be made a party defendant.

United States vs. Cooper, 196 Federal, 584.

Thereupon the Court made an order permitting

the name of Heaton to be added, and to amend the complaint by interlineation (Tr. 28). Thereupon the complainant served notice of amendment of the complaint (Tr. 29-31), and the complaint was thereupon amended by interlineation. Those parts interlined are underscored in the Transcript. Process was served on Heaton September, 1912 (Tr. 32-33). Thereupon the defendant Heaton filed an answer denying generally the allegations contained in the bill of complaint (Tr. 33-39). The defendant Heaton further averred that the matters and things set forth in the bill of complainant did not accrue within six years before the said bill was filed and subpoenas served upon him, Heaton, and thereby pleaded the statute of limitations (Tr. 38-39). To this answer the complainant filed a general replication (Tr. 40-41). Thereupon the case came on for further hearing and on the 15th day of January, 1914, the Court rendered its judgment wherein it was ordered and decreed that the defendant Cooper agreed to sell the said lands to said George Heaton and that more than six years elapsed from the date of the issuance of the patent to the service of the notice upon Heaton, and the concellation of the patent thereby became impracticable.

It was further decreed that the value of the land was Five Dollars and seventy cents per acre, and the complainant was entitled to recover the value thereof, to-wit: Nine hundred Twelve Dollars, with interest at the rate of eight per cent. per annum from the 13th day of December, 1909, amount-

ing in all to $1212.96, and the costs of the action. (Tr. 41-43).

It was further decreed that Cooper pay that amount and that if Cooper did not pay it that the defendant George Heaton pay it out of the purchase price, and such payment would be a discharge of the purchase price to the extent thereof (Tr. 41-43).

The defendant Cooper served notice upon his co-defendant, requesting him to join in an appeal from said judgment (Tr. 87). Heaton refused to join in the appeal (Tr. 87). Thereupon the defendant Cooper served notice of severance and thereafter an order of severance was duly made (Tr. 88-89-90). Thereupon appellant filed a petition for an appeal (Tr. 91) and had issued and served on all the parties a citation (Tr. 101.

ASSIGNMENT OF ERRORS.

The defendant, Frank D. Cooper, in the above entitled action, in conection with his appeal, hereby makes the following assignment of errors, which he avers occurred in this cause, to-wit:

I.

It was error for the court to hold and find that Jay C. Freeman, entryman of the land involved, did not build any house upon said land, and did not reside thereon, and did not fence the same, nor any or either of them prior to his final proof.

II.

It was error for the Court to hold and find that his, Freeman's, improvements did not exceed One Hundred Dollars in value, and that the defendant Cooper knew the said facts, or any of said facts when he purchased the said land from Freeman, or at any other time.

III.

It was error for the Court to hold and find that the defendant Cooper knew of the facts or any of the facts set forth in specific paragraphs Numbered One and Two, when he purchased the said land from Freeman, or at any other time.

IV.

It was error for the Court to hold and find that the defendant, Frank D. Cooper did not pay a valuable consideration for the land embraced in the Freeman entry.

V.

It was error for the court to conclude, hold and find that the final proof of the entryman, Freeman, was false and fraudulent, or that the complainant was induced to issue the patent herein involved by relying on any false or fraudulent statements.

VI.

It was error for the court to conclude, hold and find that the defendant Frank D. Cooper is not or was not a bona fide purchaser of said land.

VII.

It was error for the court to conclude, hold and find that the complainant is entitled to the relief of damages against the defendant Frank D. Cooper in the alleged value of the land, Five and 70/100 ($5.70) Dollars per acre, as stated by the court, with legal interest from December 13th, Nineteen Hundred and Nine, amounting in all to Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and all costs.

VIII.

It was error for the court to conclude, hold and find that the value of the land was or is Five and 70/100 ($5.70) Dollars per acre, no evidence having been introduced as to value.

IX.

It was error for the court to conclude, hold and find that unless the said sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars was paid by the defendant Frank D. Cooper, that the defendant George Haeton shall pay the amount thereof to complainant from the unpaid purchase money owing by the defendant Heaton to the defendant Frank D. Cooper upon his contract of purchase of said lands when made a party hereto and appearing herein.

IX.

It was error for the court to conclude, hold and find that such payment, when made by the said Heaton, should be a discharge of said purchase price to the extent thereof.

X.

It was error for the court to conclude, hold and find that the complainant has a lien for the said sum of Twelve Hundred and Twelve and 96/100 ($1212.-96) Dollars upon the land involved, and was entitled to the foreclosure thereof.

XI.

It was error for the court to conclude, hold and find that the complainant was entitled to a decree according to the findings and conclusions of the Court.

XII.

It was error for the court to order, adjudge and decree that the complainant have and recover from the defendant Frank D. Cooper the sum of Nine Hundred and Twelve ($912.00 Dollars, with interest from the 13th day of December, A. D., Nineteen Hundred and Nine, (1909), amounting in all to the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, together with the costs and taxes, for that, no issue was raised in the pleadings, and no evidence was introduced concerning the value of the land.

XIII.

It was error for the court to order, adjudge and decree that unless the said amount, Twelve Hundred and Twelve and 96/100 (1212.96) Dollars, and costs, be paid by the defendant, Frank D. Cooper, that the defendant, George Heaton, pay the same to the complainant from the unpaid purchase money

claimed to be owing by the said George Heaton to the defendant Frank D. Cooper upon his contract for the purchase of the lands.

XIV.

It was error for the court to order, adjudge and decree that upon such payment being made by the said defendant George Heaton it shall discharge the purchase price to the extent thereof.

XV.

It was error for the court to order, adjudge and decree that the complainant have a lien upon the lands and premises mentioned in the complaint, for the sum of Twelve Hundred and Twelve and 96/100 ($1212.96) Dollars, and the costs, and that it is entitled to the foreclosure thereof.

THE QUESTIONS PRESENTED UPON THIS APPEAL ARE:

(1.) Is the evidence sufficient to sustain the finding that the entryman Freeman did not comply with the law and was guilty of fraud in making his homestead entry and procuring title thereto?

(2.) Is the evidence sufficient to sustain the finding that the defendant Cooper is not an innocent purchaser without notice and for value?

(3.) Is the decree within the issues and supported by the pleadings and evidence?

ARGUMENT.

The first, second, third and fifths assignments of error relate to alleged fraud of the entryman, Freeman. In actions of this character, it is incumbent upon the plaintiff to produce evidence that is clear and convincing, and a mere preponderance of evidence should not suffice. The burden is upon the Complainant to prove the fraud alleged, and not upon the defendant to disprove it. The witness Foley knew nothing of the conditions of this claim prior to September 1906. The testimony of Mr. Kinsey does not disprove the testimony of Freeman or his witnesses. The witness knew nothing about this claim prior to 1904. The testimony of the witness Frank J. Kinsey is not sufficient to overcome the testimony of the witnesses in final proof. The witness Lavergure knows nothing at all about the claim.

The witness Thomas J. Short did not testify anything about the claim, but only about some alleged conversations with Cooper which were wholly inadmissable. The two witnesses Gardipee, did not show sufficient knowledge to testify as to the conditions of the Freeman claim or whether or not Freeman resided there. The testimony of the witness Belgrade does not prove or disprove any issue in the case, and is wholly inadmissable for any purpose.

The Complainant introduced the evidence of the entryman and his witnesses in making final proof, and having introduced it, it is entitled

to some credence, and it is incumbent upon the plaintiff to overcome that evidence by proof that is clear and convincing. This, I submit, they have failed to do.

The testimony of Short and Belgarde was inadmissable for any purpose. The Complainant sought by this evidence to show that Cooper had induced other people to file on land, but in this they failed.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles de-

pendent upon these official instruments, demand that the effort to set them aside, to annul them, or to corect mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful."

This language was quoted with approval in the case of United States vs. Budd, 144 U. S. 154.

Applying this test, the complainant's testimony falls far short of making out a clear and convincing case of fraud.

The evidence of the witness Short and Belgarde was not admissable for any purpose. It was introduced for the purpose of showing or attempting to show that other parties filed on lands at the instigation of Cooper. No proof of any contract between them and Cooper was attempted to be proven, and

it was only left to inference that Cooper had a fraudulent intent. This evidence was inadmissable.

In the case of United States vs. Budd, 144 U. S. 154, the Court said:

> "If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the Government?"

and in that case the Court further said:

> "Because a party has done wrong at one time and in one transaction, it does not necesasrily follow that he has done like wrong at other times and in other transactions."

It is contended that the burden is on the defendant Cooper to prove that he was a bona fide purchaser, without notice and for a valuable consideration.

It is only when the complinant has made out a case supported by strong, clear and convincing testimony that the burden is cast upon the defendant. Complainant has failed to make out such a case.

The complainant, appellee, failed to in any way connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practiced a fraud upon the Government and failed

to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was a purchaser in good faith, without notice, and for value.

DEFENDANT COOPER IS AN INNOCENT PURCHASER.

The defendant Cooper pleaded that he was an innocent purchaser for value and without notice. He testified that he purchased the land and paid a valuable consideration for it. He knew nothing of the claim of the complainant that the entryman had not complied with the law. Cooper is a man of large affairs, owned large quantities of land and did not critically examine every tract of land which he purchased, and he did not critically examine the land in question. Final proof had been made to the satisfaction of the Government officials, and he was entitled to rest upon the presumption that the entryman had complied with the law.

He purchased directly from the entryman after the entryman had made proof and his proof was passed upon and accepted by the Government officials.

There is a distinction between purchasing land direct from the entryman and from another. In

case of a purchase from an entryman after the acceptance of his final proof, there is a presumption that he has complied with all the provisions of the law and has a good title.

In United States vs. Stinson, 197 U. S. 200, the Court said:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."
>
> "Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction,

shall make such an attempt successful.' ''

* * *

Further:

> "But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect."

These quotations are supported by numerous decisions of United States Supreme Court cited in the original opinion, which we think unnecessary to cite here.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided."

See also Colorado Coal & Iron Company vs. United States, 123 U. S. 307.

The complainant, appellee, failed to in any way

connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practised a fraud upon the Government and failed to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was an innocent purchaser in good faith and without notice.

THE DECREE IS NOT WITHIN THE ISSUES AND IS NOT SUPPORTED BY PLEADINGS OR EVIDENCE.

The character of the decree entered renders it unnecessary to discuss at length the question of the alleged fraud of the entryman or Cooper's alleged knowledge of the fraud or the consideration paid by him for the land. The decree is outside of any issue raised by the pleadings and outside of any evidence introduced at the trial.

The suit was brought for the express purpose of cancelling the patent. The bill of Complaint was framed for that and no other purpose. If the pleadings and evidence do not entitle complainant to a decree cancelling patent, complainant is not entitled to any other relief.

The defendant Cooper alleged in his answer that he had sold the land to George Heaton. The

complainant took issue on that subject and filed a general replication.

After the testimony was taken the Court held that Heaton was a necessary party.

United States vs. Cooper, 196 Fed. 584.

The Court permitted the Complainant to amend its bill of complaint by interlineation, and an order was made to that effect (Tr. 28). The bill was amended accordingly (Tr. 29-30-31). The parts interlined are underscored in the bill of Complaint so that they may be identified by the Court.

More than six years elapsed from the date patent was issued and the order making Heaton a party and the service of process upon him. He pleaded the statute of limitations (Tr. 38-39).

The Court by its decree, adjudged and decreed that on account of the expiration of six years from the date of the issuance of the patent it could not be cancelled, and decreed that the value of the land was $5.70 per acre or $912., and decreed that the defendant Cooper pay that amount with interest, amounting in all to $1212.96. And unless that amount was paid by Cooper that the defendant Heaton pay it out of the money due Cooper, and such payment would discharge Heaton to the extent of such payment from the money due Cooper under the Contract.

I respectfully submit that this decree is wholly outside of the issues raised by the pleadings and

wholly outside of the evidence. There is not a single allegation in any of the pleadings or any allegation that in any way affects the value of this land, and no evidence of value was offered or admitted.

Heaton avers that he purchased this land and other lands from Cooper at $5.70 per acre, but there is no allegation that that is the value of the land.

The contract between Cooper and Heaton shows that he purchased 21,840 acres at the rate of $5.70 per acre. But the Court cannot presume that all that land was of equal value. Indeed, the Court should take judicial notice of the fact that in such a large tract of land in this mountainous country with its mountains and valleys there is a great diversity in the character and value of the land. One tract may be smooth tillable land and the adjoining tract rough and stony. One tract may be valuable for agricultural purposes and the adjoining tract worthless for any purpose other than pasture, and of little value for that. But the subject was not an issue in the case. It was not raised by the pleadings. Under the pleadings no evidence could have been introduced as to value. None was introduced. If it was an issue in the pleadings, and evidence had been admissable to prove value, the value of this particular tract would have to be established, not the price at which over 21,000 acres was sold. The question of value not being an issue, the Court could not, under a prayer for general relief determine the value of the land and declare that Cooper shall pay the

amount, and that if he does not pay that Heaton shall pay it and he shall thereupon be discharged for that amount due Cooper under the contract.

Heaton has sold the land. Can an execution issue against Heaton? Can an execution issue against Cooper? Can the government order a sale of the land and compel Cooper to pay any deficiency? To support a judgment of that kind there must be proper allegations. It is elementary that a decree must be supported by the pleadings and the evidence. The decree in this case is not supported by the pleadings and the evidence is wholly outside of both.

In Windsor vs. McVeigh, 93 U. S. 274, the Court said:

> "Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and canont then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is

powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

In Washington, Alexandria & Georgetown Railroad Company vs. Mayor and Board of Aldermen of Washington, 77 U. S. 299, 19 Lawyer's Edition, 894, the Court said:

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only which is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration."

In Crocket vs. Lee, 7 Wheaton 523, Chief Justice Marshall said:

"The rule that the decree must conform to

the allegations as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case."

In English vs. Foxall, 2 Peters 595, the Court said:

"There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency."

In Hayward vs. Bank, 96 U. S. 611, the Court said:

"But such liability is not charged, nor is such relief asked in the bill. The specific relief sought is a decree requiring the Bank to transfer the stock to him—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this action to a decree for the value of the stock, even if the facts justified any such relief."

And so in the case at bar. The Court acknowl-

edged and decreed that it was beyond its power to do that which the Complainant demanded in its prayer for relief and as set forth in its pleadings, and such relief being beyond the power of the Court, it gave a judgment and decree and relief to the Complainant wholly outside of the issues and wholly unsupported by evidence.

In the case of New Orleans vs. Citizens Bank, 167 U. S. 371, the Court said:

> "We are at a loss to understand by what process of reasoning the decree was made to cover the question of the nonliability of the bank for license. It was not presented by the pleadings, and was entirely dehors the issues in the case."

The same rule prevails in all courts.

In Alywin vs. Morley, 41 Mont. 191, 108 Pac. 778, the Supreme Court said:

> "It will, however, be conceded that the judgment in her favor must rest upon some proper pleading, either her own or that of the plaintiff. A judgment without a pleading to support it cannot stand; and this is the reason why the question whether a complaint states facts sufficient to constitute a cause of action is never waived and can be raised in this court for the first time."

The judgment entered in this case, being outside of and not supported by the pleadings or evi-

dence must be reversed. The court, having adjudged and decreed that the patent cannot be cancelled, thereby affirmed the patent and the complainant not having appealed from that judgment, it became final. The complainant is not entitled to any relief whatever under the issues raised in the pleadings and the judgment should be reversed and the action dismissed.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellant.

NO. 2460.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANK D. COOPER,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

GEORGE HEATON,
Defendant not joining in appeal.

APPELLEE'S BRIEF.

BURTON K. WHEELER,
United States Attorney,
District of Montana,

FRANK WOODY,
Assistant U. S. Attorney,
District of Montana,

Solicitors for Appellee.

NAEGELE PRINTING CO., HELENA, MONT.

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FRANK D. COOPER,
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GEORGE HEATON,
Defendant not joining in appeal.

APPELLEE'S BRIEF.

This case, as briefly stated in appellant's brief, in his statement of the case, is one that was brought for the cancellation of the patent to certain lands comprising the homestead entry of Jay C. Freeman. The allegations of fraud and other matters set forth in the pleadings can only be fully understood by a reading thereof, so no attempt will be here made to elaborate on the statement of the case as appellant has stated it and we content ourselves with replying to the argument of counsel for appellant as set forth in his brief.

ARGUMENT.

Appellant, in the same manner as he did in the companion case No. 2461, after a few general comments on the evidence in the case proceeds to state that there is no evidence to sustain the findings of the court of the decree appealed from and cites a few cases to show that his contention is correct. It seems that when one makes such a sweeping charge he at least should attempt to summarize the evidence in the record and so there may, apparently at least, be something to sustain his contention before the court. We earnestly contend that there is more than ample evidence in the case at bar to sustain the decree and that it is most convincing, indeed, not only greatly preponderates, but, is only met with the defendant Cooper's half hearted denials and usual inability to recollect anything.

The witness Foley testified: that he was a special agent in the General Land Office; that he examined the Freeman entry about the 16th day of September, 1906; he had had occasion to examine almost all the land in the same township; had identified many corner stones and knows particularly the tract under consideration, which was within an enclosure including other lands; that he found the following improvements when he examined the land: a 12 x 16 frame cabin with a shingle roof; the cabin had no window in it; no stove pipe hole or chimney; it had a door frame or opening where a door could go but door in it; he found that the door frame was absolutely untouched and unmarred

by screws, nails or hinges, or anything of that sort; the cabin had never been used; that Mr. Cooper owned the enclosure within which this land was and resided in the next township east of the one this entry was in. There was no fence on the entry proper, except that it was intersected by a piece of fence; there was no fence surrounding the entry on its outer lines; he was over the land a number of times; the cabin was on the outer edge of the Cooper enclosure; there was no plowed ground on the land; there had been no cultivation on the entry; (Tr. pp. 45-48).

William L. Kinsey, testified: that he had lived in Township 19 N., R. 3 W., since April 1904, which is the one the entry is in; knew Cooper twenty-four years; Freeman worked for Cooper during the year 1904; knew Freeman's entry, first saw it in February or March 1904, had been over the entry five or six times before the making of final proof by Freeman; prior to final proof the erection of a cabin had been started on the claim, the east and west sides of the cabin had been put up, one or two boards and a pair of rafters on each end; there was no floor or roof on the cabin at that time; that a Mr. Gardipee finished up the house in June of that year by putting on the roof and the ends. The witness was with Mr. Foley when he inspected the claim and then the cabin was as Foley stated it was; he never saw any land broken up on the claim and it was never fenced at the time final proof was made; (Tr. pp. 48-50).

Edwin R. Jones testified: that he was acquainted with the Freeman entry; first saw it in the early spring of 1905; saw the cabin on it; the cabin had no door or window; there was no fence on the land; Freeman was a sheep herded or camp tender for Mr. Cooper; when he first saw the house it looked as though it had just been built and had never been inhabited; that it might have been built a year but no longer; he first met Freeman in 1904, (Tr. pp. 50-51).

Frank J. Kinsey, testified: that he had lived around the country there for 24 years; that he first saw the Freeman entry in 1902 while riding after horses; that he moved on a claim of his own in section 21, same township, in April 1904; he knows the Freeman entry and there wasn't anything on it when he first saw it in 1902; the next time he saw it was in February or March 1904 and there was a house on it at that time, but the house had no roof on it, or ends in it, just sides; there was no furniture, floor or cooking utensils in it; there was some more work done on it—a shingle roof, floor and ends put on and hole cut for door but no hole for a window or stovepipe hole or chimney; never saw anyone living on the claim; there were no other improvements on the claim; Freeman was working for Cooper in June or first of July, 1904; witness saw Cooper in and around Freeman's claim a great many times; from the time he was up in that country from April 1904 Cooper was up in that part of the country a great many times. (Tr. pp.

52-53).

John Lavergure testified: that he was a ranch hand and knew Cooper in 1904 or 1905; knew Freeman before that time; Freeman worked for Cooper at same time witness did; that he knew the Freeman claim; that he had been on it but never saw any one living on it; when witness worked for Cooper the cabin on claim had no door in it; Freeman worked running sheep for Cooper in a lambing camp. (Tr. p. 54).

John Gardipee, Sr., testified: that he had known Cooper for ten years; that in 1903 he moved out to claim one mile from the Freeman entry and was acquainted with the Freeman entry; that when he first saw the house on the Freeman entry, there were two sides on it and the rafters but no roof or floor. Witness further testified that he was the man referred to by other witnesses as the one who completed the house; that he put the ends and roof on the house about August, 1904, and settled with Mr. Cooper for the work after it was done; that there were no other buildings on the entry when he first saw it. He first talked with Cooper about doing the work. (Tr. pp. 56-57).

John B. Gardipee, testified: that in the years 1902, 1903 and 1904 he was out near the Freeman entry working nearly all the time and noticed Cooper travelling through there off and on. That before John Gardipee, Sr., had done the work, he testified to on the house, it had only two sides on it, no roof, floor in it and there was no fence on the

land. Freeman worked for Cooper all of 1902 and 1903 and a part of 1904. (Tr. p. 58).

William M. Belgrade testified: that when he saw the cabin in 1905 there was no door in it. (Tr. p. 59).

The testimony given by Richard T. Loss and William S. Kirkland, as witnesses for Freeman upon submitting final proof of compliance with law for his homestead, was introduced in evidence and both of said witnesses testified as follows:

I am well acquainted with the claimant (Freeman) and the land embraced within his claim; it is grazing land only, cannot be cultivated; Claimant settled upon the homestead July 2nd, 1902, built a house and established residence; claimant is unmarried and has been upon the homestead most of the time since first establishing residence on it; claimant has worked out some, and as to absences from the land the total does not exceed three months in any one year since entering the land; none of the land has been broken up as it is most valuable for grazing in its natural condition; the land is too rocky to admit of being broken up and cultivated and has been used only as grazing land, about 50 head of stock have been grazed there; the improvements on the land are a 16 x 18 house with shingle roof, all fenced, post and three wires, irrigation ditch through it, value of improvements $400.; not interested in entry and think claimant has acted in good faith, (Tr. pp. 61-63).

The testimony given by Freeman upon making

his final proof before the land office for his entry was introduced in evidence and is as follows:

I am the identical person who made homestead entry for SE ¼ SW ¼ Sec. 8, E ½ NW ¼, and SW¼ NW ¼ Sec. 17, Tp. 19 N. R. 3 W. on July 2, 1902, and claim the same; I first built my house on the land in July 1902 and settled and established residence; house is frame, 16 x 18 feet, shingle roof, all land fenced with 3 wires and posts of cedar one rod apart; ten acres of land in grass seed and irrigated; value of improvements $400.00; I am unmarried; have been away from land working for wages; my total absence will not exceed more than three months in any one year since entry. The land is not fit for cultivation and is used for grazing 50 head of stock each year; none of it is cultivated; it is grazing land only and cannot be used advantageously for any other purpose. I have no other personal property except on claim. (Tr. pp. 65-67).

The final affidavit of said Freeman final in the land office at the time of applying to make final proof contained the following statement: "That I have made actual settlement on and cultivated and resided upon said land since the 2nd day of July, 1902, to the present time." (Tr. p. 68).

In addition to the foregoing the appellee, himself, testified that he moved into the township where Freeman's claim was, in 1876, and two or three years later took up a homestead; that Freeman had worked for him but he didn't remember when it was. The rest of appellee's testimony was almost

entirely a statement that he did not recollect this or that. Indeed, it is remarkable that a man of "large affairs," such as it is contended that Cooper is should have purchased land so recklessly without regard even to its quality, improvements or anything except that a deed was delivered upon the payment of the purchase price.

The rest of appellant's testimony was merely that he did not remember; he kept no books to show when Freeman worked for him; he did not remember of Freeman having filed upon the land, or whether he accompanied Freeman to the land office when any papers were made out either to file or in and about the final proof; he did not remember whether the deed was made at the time of final proof or later, but it was about at that time he said (Tr. p. 79). He did not remember whether Gardipee had ever fixed the cabin, but said, if Gardipee had, it was done after Freeman had sold it to him. In fact his entire testimony was composed entirely of either denials of the positive testimony given by appellee's witnesses or statements that he had no recollection about the matter.

It seems incredible that a man of Cooper's business ability should have so conducted himself in and about the purchase of land that he would purchase even a hundred and sixty acres of grazing land without at least remembering whether he had ever seen it prior to such purchase. He testified that he lived in the neighborhood from 1876 to 1910 and in all but three years of such time had had

a homestead in said township with the claim under consideration. His ownership of 21,000 acres of land in the vicinity of this claim does not bespeak well for the truthfulness of his statements that he knew nothing about the Freeman entry before he purchased it. Is it possible that a man, who purchased such a vast tract of land as is shown by the record Cooper did, would pay two, four or six hundred dollars or more without having examined any portion of it prior to paying the consideration therefor. Cooper admits that Freeman had worked for him, but cannot remember whether it was in 1901, 1902, 1903, 1904, 1905 or 1906, or any specific year.

The testimony of the witnesses Short and Belgarde (Tr. pp. 55-57; 58, 59), was certainly admissible to show the usual method employed by appellant in obtaining title to land from the United States. Short testified that he was to receive something like $100.00 for using his filing right for Mr. Cooper (Tr. p. 55); Short never saw the land; the description and papers were furnished by Cooper and Cooper paid the filing fees (Tr. p. 55). Belgarde also filed on a piece of land at Cooper's suggestion, and Cooper must have paid for making out the papers and the filing fees; he (Belgarde) never did; (Tr. pp. 58 and 59).

In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for, from the very nature of things, persons, who are engaged in the business of acquiring

land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary, such persons are careful that no written evidence of their scheme to obtain the land is valuable and no one except the entryman who is duped into taking up the land for a few paltry dollars is present. Indeed, it is remarkable that a man of apparently good standing in the community will go into the business of acquiring land, as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest that they have always been acting in good faith and are purchasers for a valuable consideration, when in truth and in fact they have watched men like Freeman file upon claims and seen the land laws more honored in their breach than observance. The most unobserving persons in Cooper's position would have been compelled to notice that Freeman's entry was sham and a fraud and unless like Cooper were desirous of acquiring it would have denounced it for what it was a palpable attempt to defraud the government.

In the case of U. S. v. Stimson, 197 U. S. 200-207, cited by appellant on page 14 of his brief, the decision of the court was based upon the fact that forty years had elapsed since the commission of the alleged fraud and the institution of the suit and the purchaser from the patentees had held the lands and obtained large credits on the strength of being such owner, and the creditors were equitably entitled to protection. This together with the weak-

ness of the evidence was the reason for said decision, but the poor quality of the evidence was not alone the basis of the decision.

In the case at bar we have no such considerations as there were in the Stimson case, *supra;* here Cooper had retained the lands, and only a few years had elapsed and no rights of creditors are involved.

Appellant seems to argue that because he purchased this land from Freeman without any knowledge that the United States claimed Freeman had not complied with the law, that he is an innocent purchaser for value. But a man cannot sit idly by and live in the neighborhood of a piece of land and the land bought by him, and say that he was innocent of what Freeman had done. A man cannot close his eyes, as Cooper desires this court to believe, and then profit by his endeavors to notice nothing. He must have known on August 18, 1904, when he purchased the land, that Freeman had worked for him herding sheep for several years prior thereto, and knowing that Freeman was so in his employ, he, an experienced sheepman, knew that Freeman did not herd sheep at some remote portion of Cooper's 21,000 acres and return to the claim every night, or even maintain a "continuous residence" as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Freeman had practiced a fraud in making his final proof. Indeed, Cooper

was so anxious to secure this land that he could not even wait until a final receipt or certificate had issued for it, but purchased it on August 18, 1904, the same day final proof was made and five days before the final receipt or certificate issued, and about six months before patent issued (Tr. pp. 6-9; 14; 23; 24). It is absurd to say that a man who owns a large tract of land, "a man of large affairs," is by reason of that fact not expected to know what is being done with a piece of land near which he had lived, on which he grazed sheep, in whose service the entryman had been engaged for several years prior to the final proof and purchase.

We most respectfully submit that the evidence in this case shows most conclusively: That Freeman never complied with the law so as to entitle him to a patent; that both Freeman and his witnesses on the final proof hearing are shown to have been most reckless with the use of the truth; that the statements contained in the testimony given on the final proof hearing were absolutely false and were made for the sole purpose of deceiving the officials of the United States Land Office; that Cooper was aware of all that transpired in and about the homestead of Freeman and particularly as to the improvements never existing as the final proof witnesses said they did and that no residence was ever established or maintained as was claimed. Cooper does not deny that the testimony given at the final proof hearing was false but contents himself with asserting that he knew nothing about it.

He bases his good faith upon what was contained in the final proof and its acceptance by the officials of the land office, but his knowledge of the country and the doings therein acquired by nearly thirty years residence and the fact that Freeman had been in his employ for several years immediately prior to the making of the final proof must have advised him that a fraud was being perpetrated and he cannot claim he was without fault. The mere fact that the title he bought was nothing but one based on a final receipt, issued five days after the purchase, was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry and his neglect is no protection to him. His "large affairs" and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all the details of acquiring the public domain. Cooper's pretended ignorance of what Freeman had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud. Indeed, his statement that he knew nothing of the final proof proceedings is shown to be false as the deed was dated on the same day and undoubtedly was for the purpose of securing to Cooper the fees and price paid the United States at the final proof hearing otherwise why such haste to take a deed for land for which no land office certificate had yet issued.

THE DECREE.

It is contended by the appellant, that this action having been brought for the purpose of having cancelled a patent issued to the entryman of the land in question, the court could not make or enter any decree except a decree cancelling the patent or a decree dismissing the bill of complaint, and that more than six years having elapsed between the date the patent was issued and the date when the defendant Heaton was made a party to the action, the defendant Heaton in his answer having pleaded an interest in the lands and the statute of limitations, the court could not enter a decree cancelling the patent and could only enter a decree dismissing the bill of complaint.

In order to arrive at a proper understanding of the contention of the appellant it is necessary to review briefly the pleadings in this action and a portion of the evidence taken by the Examiner in Chancery.

In the original bill of complaint the appellant Cooper was named as the sole defendant. After alleging certain acts which constituted fraud on the part of the entryman, the bill of complaint alleged that the appellant Cooper knew, at the time he purchased the lands, of the fraud perpetrated by the entryman and purchased the land with full knowledge thereof. The bill of complaint was filed on December 7th, 1909. The appellant appeared and filed his answer to the bill of complaint on

March 29, 1910. In his answer the appellant, after certain making certain admissions and denials, alleges that before the commencement of the suit he had entered into a contract with one George Heaton, whereby he had agreed to sell said land to said George Heaton for a valuable consideration, and that the said Heaton, without any knowledge of any fraud on the part of the entryman, had purchased said land from the appellant Cooper. (Tr. p. 26). Upon the filing of the appellant's answer in which the purchase of the land by Heaton was alleged, the appellee obtained an order directing that George Heaton be made a party defendant, and permitting the appellee to amend its bill of complaint so as to state the case as to him, (Tr. p. 28). After obtaining this order the appellee amended its complaint by making certain interlineations in the original bill of complaint, by adding thereto an additional paragraph numbered "Eleventh" and by adding to the prayer a provision asking for the cancellation of the contract for the sale of said land referred to in the appellant's answer. (Tr. pp. 29-31). All of these amendments are indicated in the transcript by underscoring, so that it may be readily seen from the transcript the diference between the original bill of complaint as filed and as the same stood after these amendments were made. (Tr. pp. 2-18). After the making of this order and the amending of the bill of complaint, the defendant Heaton filed his answer on December 2nd, 1912, (Tr. pp. 33-40), in which, after making certain ad-

missions and denials, he alleged that on December 13th, 1909, the appellant and defendant entered into a contract for the sale of said land, together with other lands, by appellant to defendant, at $5.70 an acre, and that on the 22nd day of April, 1911, the defendant Heaton had assigned, sold and transferred all of his interest in said contract to the Great Falls Farm Land Company, (Tr. pp. 37-39). To each of the answers of the appellant and defendant the appellee filed its replications, (Tr. pp. 27 and 40).

It will be seen from this review of the pleadings, that the action was originally commenced against the appellant Cooper for the purpose of cancelling a patent to certain lands, that after the appellant filed his answer alleging that he had parted with his title to said lands under a contract for the sale thereof to the defendant Heaton, the bill of complaint was amended so as to make Heaton a party defendant and so as to state a case as to him, and that thereupon the defendant Heaton filed his answer alleging that he had acquired an interest in said lands by virtue of having entered into a contract for the purchase thereof with the appellant Cooper, but that this defendant had thereafter parted with his interest in said lands by assigning and transfering said contract to the Great Falls Farm Land Company.

After the appellee had introduced its evidence in support of the allegations contained in its bill of complaint as amended, the appellant and defend-

ant introduced evidence in rebuttal thereof and also in support of the allegations in said answers that the appellant Cooper had entered into said contract to sell said land, together with other lands, to the defendant Heaton.

The appellant Cooper, testifying in his own behalf and that of the defendant Heaton, stated that he had sold said lands which he had purchased from the entryman, (Tr. p. 70). There was thereupon introduced in evidence a contract between the appellant Cooper and the defendant Heaton for the sale of said lands, together with other lands, by appellant to the defendant, (Tr. pp. 71 to 78). This was all of the evidence introduced to prove these allegations as to the contract and sale by the appellant to defendant.

From an examination of this contract, introduced in evidence, we find that on December 13th, 1909, four days after the filing of the bill of complaint against the appellant, the appellant and defendant Heaton entered into said contract; that this contract provides for the sale of 21,840 acres of land, including the land involved in the action, at the rate of $5.70 an acre, payments to be extended over a period of years, the last payment becoming due October 1, 1914, and no deeds to be delivered until final payment made.

It will be observed that while the defendant Heaton in his answer alleged that he had parted with all of his interest in said contract by assigning and transferring the same to the Great Falls Farm

Land Company, no evidence whatever was introduced to show an assignment, so that as the evidence now stands we find that a contract was entered into between the appellant and defendant Heaton, and that Heaton still holds and retains said contract.

The court, in its decree, found that all of the allegations of the bill of complaint as to the fraud of the entryman were fully sustained by the proof; that the allegations of said bill of complaint that the appellant had full knowledge of such fraud at the time he purchased said land was fully sustained by the proof; that a contract for the sale of said land was entered into between the appellant Cooper and the defendant Heaton; that more than six years had elapsed between the date of issuance of patent and the date of the order directing the making of Heaton a party defendant to said action and that it was therefore impracticable to cancel said patent; that the value of said lands was $5.70 an acre; (Tr. pp. 41-43).

All of these findings of the court are fully sustained by the proof. We have heretofore considered the evidence introduced to prove the fraud on the part of the entryman and the knowledge thereof by the appellant Cooper so that it is not necessary to examine this evidence here. The contract introduced in evidence supports the finding of the court as to the existence of the contract, while the date of the issuance of patent, as alleged in the bill of complaint, and the date of the order directing that Heaton be made a party defendant show

that more than six years elapsed between these dates and sustain this finding. Appellant contends, however, that there is no evidence as to the value of the land. We take it, that it is a principle of law that cannot be contradicted that all of the evidence must be taken and considered together, and that evidence introduced on the part of a defendant which tends to prove the plaintiff's case will be considered in connection with the plaintiff's case in exactly the same manner as though such evidence was introduced by the plaintiff. This being true we have in evidence the contract between the appellant and the defendant Heaton in which it is stated that this land, together with other lands, is to be paid for at the rate of $5.70 an acre. Here then is direct proof introduced by the defendant showing the value of the lands, the value which the appellant was willing to accept and the defendant Heaton willing to pay. This evidence is sufficient to sustain the finding of the court as to the value of the lands.

But whatever the findings of the court may have been, the appellant strenuously contends that the action having been brought to cancel a patent the court could not enter a decree refusing to cancel the patent, but decreeing that the value of the land, with interest thereon, should be paid by appellant to the appellee, or if the appellee failed to pay the same that the defendant Heaton should pay the amount and withhold the same out of the purchase price under said contract remaining unpaid, and

that the appellee should have a lien on said land for such amount and foreclosure of such lien, and that such decree as entered is not sustained by the pleadings in the case.

In support of this contention the appellant cites a number of authorities. Upon an examination of these authorities we believe that the only authority cited which is at all in point is that of Crocket vs. Lee, 7 Wheat. 523, and appellant certainly must possess a most optimistic mind if he can obtain any satisfaction out of that particular decision. None of the other cases cited by appellant, when the subject matter of each particular case is considered, have any application to the case at bar.

At this time it is well to remind appellant that he alone is appealing from the decree entered in the lower court. The defendant Heaton seems to be well satisfied with the decree entered as he refused to join in this appeal and an order of severance was made (Tr. pp. 89-90), permitting the appellant to appeal.

We are free to confess that if evidence had been introduced by appellant and defendant showing that the defendant Heaton had transferred his interest in said contract to the Great Falls Farm Land Company, as he alleged in his answer, no decree could have been entered which would have been binding on either the defendant Heaton or on the Great Falls Land Company, but in the absence of such evidence does the appellant mean to contend that the court could not enter a decree which would be binding

on Heaton, particularly where, as in this case, he will suffer no injury whatever by reason thereof? The court found that fraud was committed by the entryman and that the appellant purchased the land with full knowledge of such fraud but that the defendant Heaton had no such knowledge. The decree is to the effect that the appellant Cooper, who became the owner of said land with knowledge of the fraud of the entryman, is the one who is to suffer. Heaton suffers no injury, he is simply directed to pay out of the amount he still owes the appellant Cooper the value of the lands with interest. It could make no difference to the defendant Heaton whether, in the absence of the decree, he should pay the balance of his purchase price to the appellant, or whether, the decree being entered, he pays the value of the land with interest to the appellee, retaining such amount out of the balance due the appellant under the contract. In either case he will pay the full purchase price for all of the lands covered by the contract, no more and no less. This being true the appellant then comes into this court on this appeal, with the findings of the court sustaining the allegations of the bill of complaint as to fraud on the part of the entryman and knowledge of such fraud by the appellant at the time he purchased the lands, and says, that because the action was an action to cancel the patent and the court found it impracticable so to do, he ought not to be required to make restitution, and that notwithstanding his participation in the fraud or the

fact that he has been benefitted thereby when he had knowledge thereof, he should be permitted to go hence without being compelled to suffer in any way for his own wrongful and unlawful acts. He comes into court with unclean hands and contends that even if he did have knowledge of the fraud of another whereby the appellee was injured and he was benefitted by that fraud he should be permitted to continue to enjoy such benefits and the appellee should have no recourse against him for such injury. The rules of equity which require that one who seeks equity must do equity and that one cannot come into a court of equity with unclean hands and ask for equity apply with all their force to this particular case. While the bill of complaint asks for the cancellation of the patent, yet, the decree as entered, while refusing to cancel the patent, requires nothing more than that equity and justice be done between the parties benefitted and injured by the fraud practiced by the entryman.

The prayer of the bill of complaint, as amended, asks for specific relief, the cancellation of the patent, the deed from the entryman to the appellant and the contract between appellant and defendant, and also asks for "such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience," (Tr. p. 17).

Under a prayer for general relief a court of equity will extend relief beyond the specific prayer

and not exactly in accordance with it and any relief that is agreeable to the case made by the pleadings can be granted under such a prayer, a court of equity having power to adapt its remedies to the circumstances of each particular case as developed by the pleadings and evidence, and in this case it was the duty of the court, after finding it was impracticable to cancel the patent, as prayed for in the specific prayer of the bill of complaint, by its decree to adopt and prescribe such remedies as would require justice to be done between the parties.

In the case of Walden vs. Bodley, 14 Peters 156, Justice McLean, in delivering the opinion of the court, said:

> "But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court should adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it."

And in this case the court, having found it impracticable to cancel the patent, but having a case fairly made by the bill and answers, it was within its power to, by its decree, adopt such remedies as would do justice between the parties.

In Lockhart vs. Leeds, 195 U. S. 427, Justice Peckham, who delivered the opinion, said:

> "Again it is alleged that the bill prays that the location of what is called the Washington Lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations of the bill do not justify such relief. All of the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not, was a matter of law arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any

inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees ex maleficio, for his benefit."

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief, under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of English vs. Foxhall, 2 Pet. 595; Boone vs. Chiles, 10 Pet. 177; Hobson vs. McArthur, 16 Pet. 182; Hayward vs. National Bank, 96 U. S. 611; Georgia vs. Stanton, 6 Wall. 50, are not opposed to the views just stated."

See also:

Watts vs. Waddle, 6 Pet. 389;

Ridings vs. Johnson, 128 U. S. 21;

Tayloe vs. Merchants, 9 How. 390;

Stevens vs. Gladding, 17 How. 447;

English vs. Foxhall, 2 Pet. 595;

Sage vs. Central Ry. Co., 99 U. S. 334;

Hepburn vs. Dunlop, 1 Wheat. 179;

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396.

In Tyler vs. Savage, 143 U. S. 79, the court, speaking through Justice Peckham, said:

> "The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consanant with the facts set out in the bill as a ground of relief against Tyler personally and it was relief agreeable to the case made by the bill."

The rule, that when a party shows by a bill of complaint facts which entitle such party to equitable relief such relief, as may be agreeable to the case made and the evidence in support thereof, may be granted under the prayer for general relief, is followed in the Federal courts and in most, if not all of the state courts.

> "The special relief prayed in this bill is to quiet title or remove a cloud, but there is also a prayer for general relief. Upon the state of facts set forth by the bill I am of the opinion that plaintiff cannot have the special relief he prays, but rather would be entitled to a decree declaring him to be entitled to the legal estate and that the defendants hold the same in trust for his use and benefit, and for a conveyance

of the same to him, etc. But misapprehension by the plaintiff as to the special relief he is entitled to is no ground for demurrer where there is a prayer for general relief, for in such a case, if the bill sets out facts showing a right to relief the court will grant the proper relief under the general prayer."

Patrick vs. Isenhart, 20 Fed. 339;

Adams vs. Kehlor Mill. Co., 36 Fed. 212.

"Under our statutes and the practice which must prevail in courts whose law and equity powers are blended like ours, it would clearly appear that, in a case like the present, where plaintiffs have brought a civil action for the enforcement and protection of their rights, or the redress and prevention of their wrongs, it is the duty of the court to grant such relief as the complaint and the proof made thereunder, show them entitled to receive, without any distinction between law and equity. If they have a remedy at law let it be enforced; and if the remedy is an equitable one let it be applied in like manner."

Leopold vs. Silverman, 7 Mont. 266.

"If the prayer of a bill in equity is for general as well as special relief the court has power to mold the decree to meet the case made on the record."

Spevey vs. Frazer, 7 Ind. 661;

Pensacola & G. R. Ry. vs. Spratt, 12 Fla. 26.

"When the relief granted is not repugnant to the facts alleged and proved it is properly granted, altho not specifically prayed for, under the prayer for general relief."

Penn vs. Folger (Ill.) 55 N. E. 192.

"A court of equity, having jurisdiction of the parties and the subject matter, will make its jurisdiction for complete relief."

Ober vs. Gallagher, 93 U. S. 199.

"Equity, having obtained jurisdiction of the principal question, will proceed to give such complete relief as the justice and equity of the case may require."

Hopburn vs. Dunlop, 1 Wheat. 179.

"A general prayer for such relief as may be just and equitable warrants the court in granting to the plaintiff such relief as the facts upon the trial justify."

Finlayson vs. Peterson, (N. Dak.) 57 Am. St. Rep. 584.

See also:

Vol. 39 Cent. Dig. Plead. 143-144.

In this case the decree granted relief which was not inconsistent with the allegations of the bill of complaint. It is true that the decree did not order the patent cancelled, but it granted the appellee relief from the fraud practiced by the entryman by taking from the appellant, who knew of the

fraud, the benefits he derived therefrom, and giving such benefits to the appellee who was defrauded. That, to which the appellant was not entitled, was by the decree taken from him, and given to the appellee to reimburse it for the land out of which it had been defrauded. The relief granted by the decree was consistent with the case made by the pleadings, not the bill of complaint alone, but all of the pleadings in the case, and adjusted the equities between the parties. If the findings of the coure are correct and the appellant knew of the fraud practiced upon the appellee then in equity and good conscience he ought not to be permitted to reap the benefits of such fraud, and all that the decree does is to take from him these benefits and give them to the party who was defrauded. The decree was properly entered and should be sustained.

In the event, however, that this court should find that the allegations set forth in the bill of complaint are not sufficient to sustain the decree, we submit, that in view of the evidence taken in the case and which does fully sustain the decree, this court should remand this case to the lower court with directions to so amend said bill of complaint that the same will conform to the evidence and sustain the decree.

> "When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, may re-

mand the case to the court below for an amendment of the pleadings and such further proceedings as may be just."

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396;

Crocket vs. Lee, 7 Peters 522;

Watts vs. Waddle, 6 Pet. 389;

Walden vs. Bodley, 14 Pet. 156;

Neale vs. Neale, 9 Wall. 1;

Harden vs. Boyd, 113 U. S. 756;

Adams vs. Kehler Mill Co., 36 Fed. 212;

Jones vs. Meehan, 175 U. S. 1;

Liverpool etc. vs. Phenix Ins. Co., 129 U. S. 39.

Respectfully submitted,

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No. 2460

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GEORGE HEATON,

Defendant not joining in appeal.

No. 2460.

APPELLANT'S REPLY BRIEF.

JAMES A. WALSH,

Solicitor for Appellant.

NAEGELE PRINTING CO., HELENA, MONT.

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APPELLANT'S RELPY BRIEF.

APPELLANT'S REPLY BRIEF.

I have received the brief of the learned counsel for the Appellee. I will not again discuss the facts in the case, but beg leave to briefly refer to the position taken by counsel with reference to the Judgment, as most of the brief is devoted to that subject.

It is unnecessary to cite further authorities upon the point that a decree must be within the issues presented by the pleadings and supported by

the evidence. A prayer for general relief does not give the Court authority to render a decree, not within the issues and the evidence. This proposition is supported by the authorities cited by the Appellee.

I beg leave to continue Counsel's quotation from Lockhart vs. Leeds.

> "We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that, in substance, is what is held in the above cases."

And his quotation from Tyler vs. Savage says that the relief granted "Was consonant with the facts set out in the bill and agreeable to the case made by the bill."

It is unnecessary to further discuss this feature of the case. The learned counsel for the appellee realizes the force of these authorities and enters a plea of confession and avoidance by contending that the Court may remand the case to the lower Court to amend the pleadings, and for such other proceedings as may be just. This is not a case in which that may be done.

It is true that in some equity cases a bill may be so framed that alternative relief may be granted. The relief granted must be within the rules and principles of equity. A bill cannot be framed to demand equitable relief, and as an alternative to demand legal relief or relief that could be obtained in an action at law.

When the Government is dealing with its citizens or others under contracts, and in litigation affecting property rights, it is bound by the same rules as an individual. It has no greater rights. It is not acting in its sovereign capacity, but acting in the same right as an individual would.

Bostwick vs. U. S., 94 U. S. 53;
In re Smoots case, 15 Wallace, 36;
Amoskeag Mfg. Co., 17 Wallace, 592.

In matters relating to land, the Government has no greater rights than any other land proprietor, and in all suits affecting the same is bound by the same rules. It is elementary that if a party claims that he was induced to enter into a contract, or to part with property by fraud or through fraudulent representations, he has his choice of remedies, to rescind the contract, or affirm the contract and sue for the value of the property obtained. One is a suit in equity, the other is an action at law. He must elect whether he will rescind the contract, or affirm it and sue for the value of the property obtained, but he cannot do both. The Government, therefore, must elect to bring a suit to cancel the patent, or to affirm the patent, and sue for the value of the land. It cannot, in the same action, ask to rescind the contract, that is to cancel the patent, and ask to recover the value of the land in case the contract cannot be rescinded; or, in other words, that the patent cannot be cancelled. This is elementary. Having elected to bring an action to

cancel the patent, it is bound by its election, and cannot then ask to recover the value of the land because the patent cannot be cancelled.

Peters vs. Bain, 133 U. S. 670;

Rob vs. Vos, 155 U. S. 13;

Wesley vs. Diamond, 109 Pac. 524;

Wilson vs. Cattle Co., 73 Fed. 994; 20 C. C. A. 241;

Wheeler vs. Dun, 22. Pac. 827;

Bank vs. Board of Commissioners, 60 Pac. 1062;

Gaffney vs. Megrath, 63 Pac. 520.

An amendment cannot be allowed that will change the nature of the cause of action from a suit in equity to an action at law, or from an action at law to a suit in equity.

A suit to cancel a patent is a suit in equity. An action to recover the value of the land would be an action at law, and a Court of equity would not have jurisdiction.

U. S. vs. Bitter Root Development Co., 200 U. S. 451.

I respectfully submit that the judgment should be reversed and the action dismissed, and that the pleadings cannot be amended as suggested by Counsel for the Appellee.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellant.

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